ing any intention on the subject, or was there any other intention on the part of this man but to cause serious injury to the woman. Let me remind you what the injuries were — ". . . [*His Lordship then dealt with the medical report.*]. . . ." Now do you believe that injuries such as these were inflicted upon this woman when he had no intention, and was so drunk that he could not form the intention, to do serious injury? It is not necessary that he intended to kill; if he intended to do serious injury, and did do serious injury, and as a result of these injuries his wife died, then that is murder. The question for you is whether the prisoner has shown that he was so drunk that he had no intention and could form no intention of doing her serious injury. . . . [*After reviewing the evidence as to the position of the accused when he first seemed to realise what he had done his Lordship continued*]—. . .—The suggestion is made that this man, in consequence of an accident which happened to him ten years ago, was easily affected by drink, or rather was liable to be specially affected in this way, that he became more violent when in drink than other men. That is in law no excuse whatever. It may be a good reason for his taking the advice given to the accused more than once, that he should not indulge in drink at all; but it would be a dangerous view to set afloat that in the case of a man who knows that drink has that effect on him it is to be an excuse for anything he does after he has wilfully and wittingly put himself in the position of having too much drink. That is not the law. Quite recently there was a very important case tried in England, or rather decided in England, by the House of Lords, where this question came up as to what was the effect of drunkenness when a man had killed a fellow human being, and the case was considered of such importance that it was dealt with by eight judges in the House of Lords. Two of them were Scotsmen, one being a Scottish lawyer, Lord Dunedin, and the other Lord Haldane, and one judgment was delivered expressing the views of the whole Court. On this matter there is no difference between the law of England and the law of Scotland. It would be most unfortunate indeed if, as to the effect of drunkenness, where injuries are due to the violence of a drunk person, there was such a difference, but there is no difference at all. The result of the case may be summed up thus—that insanity, of course, is a complete answer, to this effect, that the man or person who has committed a crime cannot be found guilty if he was insane at the time even though the insanity is caused by drink; he will be dealt with as an insane person; but so far as drunkenness is concerned, their Lordships said this, that evidence of drunkenness which renders the accused incapable of forming the specific intent required to constitute the crime—that is in this case the intention to kill or to do serious injuries—should be taken into consideration with the other facts proved in order to determine whether or not he had that intention. But they said evidence of drunkenness falling short of proved incapacity in the accused to form an intent necessary to constitute the crime, and merely establishing that his mind was affected by drink so that he more readily gave way to violent passion, does not have any effect at all so far as this question is concerned. Accordingly the question comes down to this, when this man inflicted these serious blows upon his wife, was he in such a condition that he had not and could not form the intention of doing her serious injury? The injury was so serious that the doctor said it was impossible after the blows were inflicted that she could have recovered, and in point of fact we know that within an hour or an hour and a half after the attack began she became unconscious, and remained unconscious until nine or ten hours afterwards, when she died. The case is one for you. It is a serious case. As I have said, you are trying a man for his life. On the other hand, if assaults of this kind resulting in death are to be excused merely because the man is drunk at the time, that also is a very serious thing in the interests of the public. It is just because of the serious character of it that I am sure you will give due attention to the evidence that has been led and the considerations that have been put before you, and that you will give a just verdict, whatever the result may be, according to your conscience and your view of the evidence.

The jury returned a verdict of culpable homicide and the panel was sentenced to twelve years' penal servitude.

Counsel for H. M. Advocate — Solicitor-General (Murray, K.C.) — Fenton, A.-D. Agent—John Prosser, W.S., Crown Agent.

Counsel for the Accused—Wark, K.C.—Gibb. Agents—D. M. Gibb & Sons, S.S.C.

COURT OF SESSION.

Saturday, July 10.

SECOND DIVISION.

[Lyon Court.

STEWART MACKENZIE *v.* FRASER-MACKENZIE AND ANOTHER.

Lyon—Armorial Bearings—Differencing—Quartering—Supporters—Title to Sue.

In a petition for reduction in whole, or in so far as it granted supporters, of an interlocutor of the Lord Lyon giving the respondents the right to use and bear arms consisting of Mackenzie quartered with Fraser and Falconer and certain supporters, *held* (*sus.* the Lord Lyon) (1) that assuming that the petitioner had right to bear arms consisting of Mackenzie undifferenced, the arms of the respondents were sufficiently differenced from those arms by the quartering with Fraser and Falconer as to exclude in the petitioner any right to challenge the grant thereof as being an infringement of his armorial rights, and

(2) that there being no right of property in particular supporters, the petitioner had no right to challenge the grant of supporters in respect that he had failed to show that the grant of supporters involved the recognition of a right or rank appropriate to him, and petition *dismissed.*

Colonel James Alexander Francis Humberston Stewart Mackenzie of Seaforth, *petitioner*, brought a petition in the Lyon Court against Mrs Beatrice Anna Fraser-Mackenzie of Allangrange, wife of Captain Robert Scarlett Fraser-Mackenzie of Bunchrew, *respondent*, and Captain Fraser-Mackenzie as her curator and administrator-in-law and as an individual, craving the Court "to recal, or if necessary to reduce, rescind, and annul [an] interlocutor [pronounced by Lyon on] 7th February 1908 in whole or in part, and to ordain the Lyon Clerk to delete from the public register of all arms and bearings in Scotland the entry made therein of the ensigns armorial assumed and used by the respondents under authority of the said interlocutor, or in any event to rectify the said entry by deleting therefrom the words 'below which on a compartment are set for supporters two savages wreathed about the head and middle with laurel, and carrying on their exterior shoulders a baton erect with fire issuing out of the top of it, their hair also inflamed, all proper'; and to find and declare that the respondents, jointly and severally, have no right to the ensigns armorial recorded on 22nd May 1817 in name of the aforesaid George Falconer Mackenzie and the heirs-male of his body, or in any event to the supporters of the arms of said ensigns armorial, and to discharge them or either of them from making use of the same under the penalties imposed by statute."

The *facts* of the case were—On 17th November 1609 the title, honour, and dignity of Lord Kintaill was conferred on Kenneth Mackenzie of Kintaill "et heredibus ejus masculis cognomen de Mackenzie gerentibus." Colin, his eldest son, succeeded him in the peerage and family estates, and upon him on 3rd December 1623 was conferred the title, honour, and dignity of Earl of Seaforth "et heredibus ejus masculis." Colin died without male issue, and the dignities and family estates passed to his brother George the 2nd Earl, who was succeeded therein by his son Kenneth the 3rd Earl. His eldest son Kenneth succeeded to the dignities and estates as fourth earl, and in turn was succeeded therein by his eldest son William the 5th Earl, who having taken part in the rising of 1715 was attainted by the Act 1 Geo. I, cap. 42, and the estates and honours were forfeited. The male descendants through males of the fifth earl became extinct in 1781 on the death of his grandson Kenneth.

At that date the heir-male of Kenneth the 4th Earl, and of the original Lord Kintaill, was Thomas Frederick Mackenzie-Humberston, the eldest son of Major William Mackenzie, who was the eldest son of Colonel Alexander Mackenzie of Conansbay, the only brother of Kenneth the 4th Earl, who had in 1781 left surviving male descendants through males. Kenneth, the grandson of the fifth earl, disponed certain of the Seaforth estates (which had been restored to the descendants of the fifth earl) to Thomas Frederick Mackenzie-Humberston and his heirs and assignees whomsoever by minute of sale dated in 1779. Thomas Frederick Mackenzie-Humberston died without issue and was succeeded by his brother Francis, who was created Lord Seaforth. Lord Seaforth entailed his estates upon the heirs-male of his body, whom failing the heirs-female and other substitutes, under, *inter alia*, the following condition—"That each of the heirs, substitutes, and successors before mentioned who shall not succeed to my title and dignity, and the husbands of the heirs-female, shall assume and constantly retain, use, and bear the surname, arms, and designation of Mackenzie of Seaforth as their own proper surname, arms, and designation in all time after their succession to the said lands and estate, but with liberty in case of their succession to any other settled estate or estates to join the name and arms of any other family to the said name and arms." Lord Seaforth died in 1815 without leaving surviving male issue, and the male descendants of Colonel Alexander Mackenzie through males became extinct. The estates of Lord Seaforth passed under his entail to Mary Frederica Elizabeth, his eldest daughter, who married (first) Admiral Hood, a Knight of the Garter, by whom she had no issue, and (second) James Alexander Stewart, by whom she had three sons, of whom the eldest succeeded her, and died in 1881 succeeded by his eldest son, the petitioner.

On the death of Francis Lord Seaforth in 1815 the nearest heir-male of Kenneth Lord Kintaill was George Falconer Mackenzie, who was descended through males from Simon of Lochslin, a younger son of Kenneth Lord Kintaill, and the only brother of George the 2nd Earl, who left descendants. George Falconer Mackenzie was then in possession of the barony of Allangrange, being fourth of the descendants or survivors of Simon of Lochslin to succeed thereto. He took the barony of Allangrange under an entail dated in 1812, to which he was a consenter, executed by his father John Mackenzie, 3rd of Allangrange. The estate was destined thereunder to George Falconer Mackenzie and the heirs-male and female of his body and various other substitutes, and the entail provided that the entailer's son and the other heirs-substitute under the entail who should happen to succeed to the lands and barony, and the husbands of the heirs-female, should be holden and obliged to assume, and consequently retain, use, and bear the surname, arms, and designation of Mackenzie of Allangrange as their own proper name, arms, and designation in all time coming. George, 4th of Allangrange, was succeeded under the entail by his eldest son John, 5th of Allangrange, who was succeeded by his brother James Fowler Mackenzie, 6th of Allangrange, who died in 1907 without issue, and the descendants of Simon of

Lochslin terminated. James Fowler Mackenzie having become last heir under the entail of 1812, executed a testamentary disposition and deed of entail in favour, failing certain other heirs, of the respondent and the heirs whomsoever of her body, under the condition "that the said Beatrice Anna Mackenzie and each of the heirs of entail, and the husbands of each of the female heirs of entail, who shall succeed to the lands before disponed shall be obliged in all time coming after succeeding to the said lands to use and retain the surname of Mackenzie and the arms and designation of Mackenzie of Allangrange without prejudice to his or her using and retaining therewith any other surname, arms, or designation." The respondent succeeded to the estates of Allangrange under that entail.

The respondent and her brother, Colonel A. F. Mackenzie of Ord, were the children of Alexander Watson M'Kenzie of Ord, who was admittedly a descendant through males of John M'Kenzie of Ord. The petitioner averred that the female respondent was a stranger in blood to the house of Mackenzie of Seaforth. The respondents averred that John Mackenzie of Ord and Kenneth Lord Kintaill were both great-grandchildren of a John M'Kenzie of Killin or Kintail, being descendants through males of his elder and younger son respectively.

The *ensigns armorial* of material importance in this case were graphically represented upon plates lodged in process, and were as follows:—

About the years 1672-1677 the armorial bearings recorded in the Lyon Register for the Earl of Seaforth, who was then Kenneth, 3rd Earl, were—"The Right Honourable Kenneth Earle of Seaforth—Lord Mackenzie and Kintail, &c. For his achievement bears azur a deer head cabossed Or, above the shield commitall coronet and over the same on ane helmit befitting his degree with a mantle gules doubled ermine and torse of his collours is set for his crest a mount in flames proper supported by two savadges wreathed about the head and midle holding in their hand a batten erected on their shoulder burning at the end and their hair likeway's inflamed all proper the motto in ane escroll above the crest Luceo non uro." Those arms were depicted upon Plate I.

The arms of Lady Hood were recorded in the Lyon Register in 1815 as follows — "Armorial bearings of the Honble. Dame Mary Frederica Hood Mackenzie of Seaforth, eldest daughter of the Rt. Hon. Francis Lord Seaforth (who died without heirs-male) and widow of Sir Samuel Hood, Baronet. Arms—Two shields accolee that on the dexter azure a fret argent on a chief or, three crescents sable over all the badge of a Baronet of the United Kingdom of Great Britain and Ireland, in surtout the arms of Mackenzie of Seaforth. That on the sinister azure a deer's head cabossed Or, for Mackenzie of Seaforth. Crest a mountain in flames proper. . . . Motto above the crest 'Data fata secutus,' on a compartment is placed this motto 'Fide parta fide aucta' are placed for supporters on the dexter a greyhound proper collared gules and pendant therefrom a badge Or charged with a caberfieds and on the sinister a savage wreathed about the head and middle with laurel holding in exterior hand a baton erect on his shoulder burning at the end and his hair also inflamed all proper, which arms and supporters are assigned to the Honble. Dame Mary Frederica Elizabeth Hood Mackenzie and the same arms crests and supporters (with the exception of the shield on the dexter side, it being the arms of her late husband Sir Samuel Hood) to the heirs-male of her body." Those arms were depicted on Plate IV.

In 1890 the petitioner as heir of line and representative of his great-grandfather Francis Lord Seaforth matriculated arms in the Lyon Register as follows—"Quarterly first and fourth azure a deer's head cabossed Or for Mackenzie of Seaforth and Kintail; second and third Or a Fess checquy azure and argent surmounted with a bend engrailed gules all within a double tressure flory counterflory of the last for Stewart Earl of Galloway. Above the shield is placed a helmet befitting his degree with a mantling gules doubled argent and on wreaths of the proper liveries are set the two following crests, on the dexter a mountain in flames proper and in an escrol above the same this motto 'Luceo non uro' for Mackenzie; and on the sinister a pelican in her nest feeding her young proper, and in an escrol above the same this motto 'Virescit vulnere virtus' for Stewart, and on a compartment below the shield are placed for supporters on the dexter a savage wreathed about the head and middle with laurel holding in his exterior hand a baton erect on his shoulder burning at the end and his hair also inflamed, all proper, and on the sinister a gray hound proper."

George Falconer Mackenzie of Allangrange on 22nd May 1817 matriculated arms in the Lyon Register as follows—"George Falconer Mackenzie of Allangrange, Esquire, male representative of Francis last Lord Seaforth, and only son of John Mackenzie of Allangrange, Esquire, by Catherine, daughter of the Honourable Jane Falconer, and grandchild of the Right Honourable Lord Halkerton, which George Falconer Mackenzie, Esquire, is great, great, great, great grandson of Sir Kenneth Mackenzie first Lord Kintail, and great, great, great grandnephew of Colin Lord Kintail, afterwards first Earl of Seaforth, and of George second Earl of Seaforth, sons of the said Sir Kenneth Mackenzie first Lord Kintail, and the heirs-male of his body, bear quarterly, first and fourth azure, a buck's head cabossed Or for Mackenzie; second and third azure, a falcon displayed argent, charged on the breast with a man's heart gules, between three mullets of the second, for Falconer; crest, a mountain in flames proper, and in an escroll this motto *Luceo non uro*, on a compartment below the shield whereon is the motto *Vive ut vivas*, are placed for supporters two savages wreathed about the head and middle with laurel, each holding in his exterior hand a baton erect with fire issuing out of the top

of it, their hair also inflamed, all proper." Those arms were depicted on Plate V.

The interlocutor of which reduction was sought and by which the respondents matriculated arms in the Lyon Register was—"*Edinburgh, 7th February* 1908.—The Lord Lyon King of Arms having considered the foregoing petition, recognises the assumption of the name of Mackenzie by the petitioners in addition to and after their surname of Fraser, and grants warrant to the Lyon Clerk to prepare letters-patent granting licence and authority unto the petitioners and to the descendants of their marriage with such congruent differences as may hereafter be matriculated for them to bear and use the following ensigns armorial, viz., quarterly, first and fourth azure, a buck's head cabossed Or for Mackenzie; second azure, an escallop between three cinquefoils argent for Fraser of Bunchrew; third azure, a falcon displayed argent, charged on the breast with a man's heart gules, between three mullets of the second, for Falconer; to be borne by the petitioner Mrs Beatrice Anna Mackenzie or Fraser-Mackenzie on a lozenge, below which a compartment are set for supporters two savages wreathed about the head and middle with laurel and carrying on their exterior shoulders a baton erect with fire issuing out of the top of it, their hair also inflamed, all proper; and by the petitioner Robert Scarlett Fraser Mackenzie on a shield above which is to be placed a helmet befitting his degree with a mantling azure doubled Or, and on a wreath of his liveries is to be set for crest a burning mountain, proper, and on an escrol over the same this motto *Luceo non uro*, and below the shield this motto *Vive ut vivas*."

On 21st October 1918 the Lord Lyon (BALFOUR PAUL) after sundry procedure dismissed the petition.

Note.—"This is a petition by Colonel Stewart Mackenzie of Seaforth praying that an interlocutor of the Lyon Court of 7th February 1908, granting certain arms to Mrs Fraser-Mackenzie of Allangrange and her husband Captain Robert Scarlett Fraser-Mackenzie of Bunchrew, should be cancelled or reduced.

"The facts of the case are as follows:—George Falconer Mackenzie of Allangrange, the male representative of that Francis Lord Seaforth who was created a Baron of the United Kingdom in 1747, recorded in the Lyon Office in 1817 the undifferenced arms of Mackenzie quarterly with those of Falconer, his mother having been a granddaughter of Lord Halkerton; he also got the Mackenzie crest of a mountain in flames, and for supporters two savages wreathed about the head and middle with laurel, each holding in his exterior hand a baton erect with fire issuing from the top of it, their hair also inflamed. George Falconer Mackenzie was succeeded by his two sons successively, John Falconer and James Fowler Mackenzie. The latter died in 1907, having made an entail of his property in favour of Mrs Beatrice Anne Fraser, wife of Robert Scarlett Fraser of Bunchrew, who are the respondents in this case. The entail contained a clause (common in many entails), by which the institute and substitute heirs of entail, and the husbands of any female heirs of entail who should succeed under the deed, were obliged to use and retain the surname of Mackenzie and the arms and designation of Mackenzie of Allangrange. The respondents have, on succeeding to Allangrange, proceeded to record in their own names the arms of the entailer as directed by the deed.

"The respondents could not 'matriculate' (in the usually accepted sense of that word) the Allangrange arms, because on the registration of 1817 they were limited to the heirs-male of the body of the grantee, George Falconer Mackenzie. But in order to carry out the directions contained in the entail they obtained a new grant of arms. In this the usual procedure of the Lyon Court was followed, it being the custom to give effect to such conditions contained in deeds of entail when they can be given effect to consistently with the law of arms; but if an entailer directed arms to be borne by his heirs of entail which were non-existent, or to which he himself had no right, such directions would not be carried out.

"The petitioner now objects to the grant having been given to Mrs Fraser-Mackenzie and her husband on the grounds (1) that the arms assumed would never have been granted to George Falconer Mackenzie as an individual or to the present respondents; and (2) that the particular supporters assumed not merely belong to the petitioner, but also are those which from time immemorial have pertained to and been used by the head of the house of Seaforth.

"Putting aside in the meantime the first of these propositions, let us look at the second. It is a claim that the supporters granted to the respondents belong to the petitioner, but what are the actual facts? In 1815 his grandmother, the Hon. Mary Frederica Elizabeth Hood Mackenzie of Seaforth, matriculated the arms of her then deceased first husband Sir Samuel Hood along with her own, as eldest daughter and heiress of her father Francis Lord Seaforth. Where Lord Seaforth really got the arms and supporters which his daughter recorded in her own name is not quite clear, and no light was thrown on it during the hearing of the case. They were not granted to him by Lyon, so he must either have assumed them at his own hand or have gone to the Herald's College in London and have got a grant of arms there, though that was certainly not his heraldic forum. What he did assume or was irregularly granted was the undifferenced Mackenzie coat with the following supporters:—On the dexter a greyhound proper, collared gules, and pendant from the collar a badge Or, charged with a caberfeidh, and on the sinister a savage, with the burning club and inflamed hair, as previously described. The occurrence of the greyhound seems to be due to a misunderstanding of the old Mackenzie supporters, which were 'grew' or stag hounds, but it will be observed that the supporter was not that of the head of

the house, but was differenced by a badge or locket being hung round from the collar, which is certainly suggestive of a Herald's College origin.

"The next step is that the petitioner in 1890 matriculated in the Lyon Register his arms as heir of line of his great-grandfather, Francis Lord Seaforth, quartering them with the arms of his grandfather Mr J. A. Stewart, Lady Hood's second husband. In this matriculation he was assigned the greyhound and savage supporters which his grandfather had previously matriculated; but in his case the positions were reversed, the savage being on the dexter and the greyhound on the sinister.

"We find then that the petitioner is in right of arms and supporters of his own, and it is difficult to understand how he can now come forward and claim supporters which have been granted to other persons. He has not proved that the grant to the respondents has inflicted any injury on him either armorially or morally. If he is heir of line of the house of Seaforth he was as much so in 1890 as he is now, and he made no attempt at that time to dispute the right of the Allangrange family to the two savage supporters, which one might have expected him to do if he felt so keenly about his rights as heir of line.

"But the petitioner says, I now object because these savage supporters have been given to persons who are entire strangers in blood to the person to whom they were granted in 1817. This is a question of pedigree, and it was fully and ably argued at the hearing of the case; but this does not need to be gone into at present. Supposing they were strangers in blood they were heirs of entail, and took the arms and supporters in accordance with the name and arms clause in the entail. Even supposing there had been no entail, they might, if they had succeeded to the property through an ordinary disposition, have applied for a grant of the Allangrange arms and supporters to themselves as 'arms of affection,' a perfectly well-defined class of arms in heraldic law. And it would have been in the discretion of the Lyon to have granted them the achievement in this way.

"It may also be asked, Has the petitioner any exclusive right to or monopoly of savage supporters, even though their hair is inflamed? I think not — although great care is taken by heralds not to grant identical arms to different persons, the same cannot be said as regards supporters. At least seven noble families in Scotland have two savages as supporters, while in England the Earl of Ancaster and the Earl of Lindsey have the practically identical supporters of a friar and a savage, the only difference being that in one case the savage is wreathed with ivy, and in the other with oak. And the same very peculiar supporters are borne with more distinct, though not conspicuous, differences by Lord Bertie of Thame and Lord Middleton.

"It is stated by the petitioner that the two savages have been borne by the head of the house of Seaforth from time immemorial, or at all events since the creation of the earldom in 1623. But there appears to be no doubt that the original Mackenzie supporters were two 'grew' or stag hunds, and it was not till about 1672 that the savages with flaming batons and hair made their appearance, having been originally the supporters of another family altogether, the Macleods of Lewis.

"In any event, the particular circumstances of this case must be kept in view. Mr and Mrs Fraser-Mackenzie got a grant of arms and supporters in 1908, not as chiefs of a clan but as heirs of entail. In this the case differed from the MacRae case so often referred to at the hearing. In the latter the petitioner was opposed by a contradictor, who certainly did not claim either supporters or the chieftainship, but who had a perfect right to say, I object to any chief being acknowledged as the head of my clan even though I do not claim the chieftainship, for reasons I shall set forth. It may also be noted that he did this in good time, having indeed lodged a caveat before the petition was presented. But in this case there was no question of either Mr or Mrs Fraser-Mackenzie having got the supporters as a chief. It was, as I have already pointed out, entirely in the discretion of the Lyon whether or not supporters should be granted. If the petitioner thought that Lyon had exceeded his powers or used his discretion improperly in granting supporters to the respondents, he should have objected either before the period of the grant or within a reasonable time afterwards. It is possible, of course, that he was not aware of the application for arms at or before the time it was made, but I cannot conceive that such knowledge did not come to him before very long. He was living in the district and was visiting at Allangrange more than once, where the whole achievement was carved above the door. Had he so strongly felt that his armorial rights were being infringed it was only natural to suppose that he would have taken some action at a much earlier period than this, and that he would not have acquiesced in the peaceable possession of these arms by the respondents for the long period of ten years.

"For the considerations above set forth I have come to the conclusion that I must refuse the prayer of the petition. This being so, it is unnecessary to discuss the interesting question of the effect of forfeiture in arms, the descent of the parties, or the respective rights of heirs-male and heirs of line."

The petitioners appealed, and on 11th July 1919 the Second Division remitted the case to the Lord Lyon in order that he might reconsider the case and deal specifically with the following matters:—"(1) The effect, if any, of the forfeiture of William fifth Earl of Seaforth—(*a*) Upon his own armorial rights; (*b*) upon those of his descendants; and (*c*) upon those of Colonel Alexander Mackenzie of Cononsbay, of his son Major William Mackenzie, and of his later descendants. (2) Apart from the effects, if any, of the said forfeiture, What were the respective armorial rights, as bearing on

the present dispute, of Lady Hood and George Falconer Mackenzie on the death of Francis Lord Seaforth in 1815? (3) Whether the petitioner, as heir of line of Francis Lord Seaforth, is entitled, either alone or along with the heir-male of any of the house of Mackenzie, to the ensigns armorial matriculated by Kenneth Earl of Seaforth in 1672-7? (4) (*a*) Whether the right of George Falconer Mackenzie to the arms recorded by him in 1817 depended on succession or on an original grant in his favour; and (*b*) if on succession, whether they were matriculated by him in the character of heir-male of Francis Lord Seaforth, or a cadet of the house of Mackenzie, or in what character or characters? (5) Whether in accordance with the law and practice of heraldry it is lawful for the Lord Lyon to grant to a stranger in blood to any person the achievement of arms appertaining to that person (*a*) undistinguished in any way, or (*b*) if the shield is quartered with other arms? (6) Whether the quartering of the Falconer and Fraser arms with the undifferenced Mackenzie arms in the respondent's achievement granted in 1908 had or has the effect of differencing the armorial insignia in that grant from those of the chief? And (7) Whether the respondents are strangers in blood to the house of Mackenzie of Kintail? With power to the Lord Lyon to order such further hearing, if any, as he may consider proper, and to do further or otherwise in the cause as he may think just."

On 21st November 1919 the Lord Lyon pronounced the following interlocutor—"The Lord Lyon . . . having reconsidered the case, finds, for the reasons set forth in the note annexed hereto in answer to the specific questions addressed to him by their Lordships, that the facts do not justify the recalling or reduction of his interlocutor of 7th February 1908."

Note.—"I have reconsidered this case in view of the above-mentioned interlocutor of their Lordships of the Second Division of 11th July 1919. For the sake of convenience I quote the points which they remitted to me to deal with, with my observations thereon.

"1. *The effect, if any, of the forfeiture of William Earl of Seaforth.*

"(*a*) *Upon his own armorial rights.*—Upon the forfeiture of the Earl his coat of arms was torn up and destroyed at the Cross of Edinburgh on the occasion of the proclamation of the forfeiture, and was cancelled or noted as forfeited in the Lyon's Register of Arms. This prevented him having any right to use these arms for the rest of his life or so long as the forfeiture lasted.

"(*b*) *Upon his own descendants.* — His lineal descendants also lost all their rights either to bear the forfeited arms or as cadets to matriculate from them, that is, to record them in their own names with a suitable heraldic difference. This did not prevent these persons from obtaining armorial rights if they so desired, because if they were individually 'virtuous and well-deserving persons' they could apply to the Lyon for a grant of arms, which he was bound to give them. Neither was the forfeiture retrospective, so that it was still open for descendants of an ancestor of the forfeited person to matriculate arms as cadets of the house as they traced their descent from a member of the family whose arms had not been forfeited.

"In certain cases, too, the forfeited arms might be made the subject of a re-grant. Thus in 1848 William Maxwell of Carruchan was granted the arms of the Earl of Nithsdale, forfeited in 1715, as heir-male of the house though not a lineal descendant of the forfeited earl. And similarly, in January 1837, Thomas Alexander Fraser of Lovat and Strichen got a grant of the old arms of Fraser of Lovat, forfeited in 1747, just previous to Mr Thomas Alexander Fraser being created Baron Lovat of Lovat in the Peerage of the United Kingdom.

"(*c*) *Upon those of Colonel Alexander Mackenzie of Cononsbay and of his son Major William Mackenzie and of his later descendants.* — As none of the persons mentioned in this sub-section were descended from the forfeited Earl of Seaforth it was open to them, if they wished to constitute a legal right to arms, to matriculate from the common ancestor the second earl, with such heraldic difference that might be found suitable for them and in accordance with the laws of arms.

"2. *Apart from the effects, if any, of the said forfeiture, what were the respective armorial rights, as bearing on the present dispute, of Lady Hood and George Falconer Mackenzie on the death of Francis Lord Seaforth in 1815?*

"Had there been no forfeiture of the fifth earl the title and arms would have descended to his son Kenneth, and on the death of the latter to his son, another Kenneth, created Earl of Seaforth in the Peerage of Ireland in 1771. The last-mentioned died without male issue, and in terms of the patent the original title along with the arms belonging to it would have been inherited by the next heir-male Thomas Frederick Mackenzie Humbertson, great-grandson of Kenneth third Earl of Seaforth. He had assumed the additional name of Humbertson on succeeding to the estates of his mother May, daughter and heiress of Matthew Humberston of Humberston, county Lincoln, and he purchased the Seaforth estates from his cousin the earl of the 1771 creation. Thomas Frederick died without issue, and the arms would then have gone to his younger brother Francis, who was created Lord Seaforth in the Peerage of the United Kingdom in 1797, with succession to the heirs-male of his body. His four sons all died *vita patris* without issue, and he himself in January 1815. Later in that year arms were recorded by his daughter Mary, who had married eleven years previously Admiral Sir Samuel Hood, Baronet, but who was now a widow, her husband having died in 1814. She recorded the arms of Hood with those of Mackenzie of Seaforth on them in an escutcheon of pretence or small shield in the middle of the Hood coat. The Seaforth arms were also placed by themselves in another shield

accolée or side by side with the other — a recognised though unusual arrangement. It will be noted that she was not a descendant of the forfeited Earl but of his father, so that the attainder did not affect her so far as the arms were concerned. The arms recorded for her in 1815 (exclusive of the Hood arms) were assigned to herself and the heirs-male of her body. By her first husband she had no issue, but she married secondly, in 1817, the Right Hon. James Alexander Stewart of Glasserton, elder son of Admiral the Hon. Keith Stewart, fourth son but second with issue of George sixth Earl of Galloway. He was succeeded by his eldest son Keith, the father of the present petitioner.

"The petitioner and appellant on 21st January 1890 matriculated the Seaforth arms quarterly with those of Stewart of Galloway, neither coat being in any way differenced, thus showing that the quartering of the coats was considered a sufficient difference. This was the last matriculation granted by my predecessor Dr George Burnett, three days before his death.

"On the death of Francis Lord Seaforth in 1815 George Falconer Mackenzie of Allangrange, as heir-male of the first Lord Kintail and of the first Earl of Seaforth, would but for the attainder have succeeded to the dignities and arms. Of the latter he got a fresh grant in 1817 quarterly with those of Falconer Lord Halkerton, his mother being a daughter of James Falconer of Monkton by his wife Jean, a daughter of David fifth Lord Falconer. Both the Mackenzie arms and the Falconer arms were given undifferenced, though it is difficult to see how the latter was so treated, as James Falconer of Monkton could not possibly have had a right to them. They were no doubt the arms of George Falconer Mackenzie's grandmother, but as she was not an heiress she could not transmit her arms to her descendants. It can only be supposed that the quartering was again considered a sufficient difference.

"3. *Whether the petitioner as heir of line of Francis Lord Seaforth is entitled, either alone or along with the heir-male, if any, of the house of Mackenzie, to the ensigns armorial matriculated by Kenneth Earl of Seaforth in* 1672-7 *?*

"The question of the relative rights of the heir-male and heir of line of a family has never been definitely made the subject of a decision by the Court of Session. In practice each case has been judged on its own merits, but it may be pointed out that an heiress in the heraldic acceptation of the designation—that is, a lady with no brothers or a co-heiress — has the right, as indeed any daughter has whether or not she has brothers, of bearing her father's arms undifferenced. An heiress, however, has the further privilege of being able to transmit these arms to her children in the form of a quartering to their father's arms, but if she marries a man of no armorial rights in himself the children would not be entitled to bear their mother's coat alone either with or without a difference. The right to bear them quarterly would only emerge in the case of a male descendant of the unarmigerous person who had married the heiress taking out a grant of arms for himself. Then he and all the persons included in the patent can quarter the arms of the armigerous ancestress. In the case of a person having a right to arms marrying an heiress he bears her arms during his lifetime on an escutcheon of pretence in the middle of his own. There are occasional exceptions to this rule, but speaking generally it is only the children who can quarter the arms of their parents or other ancestors.

"The petitioner is entitled to quarter the arms recorded by Kenneth Earl of Seaforth in 1672-7, but not to the exclusion of the heir-male.

"4. (*a*) *Whether the right of George Falconer Mackenzie to the arms recorded in* 1817 *depended on succession or an original grant in his favour ?*

"From the manner in which the register was kept in 1817 it is not always easy to see at a glance whether the entry is that of a grant or a matriculation. But on a careful examination of the entry it is evident that it was a grant of arms. There is, in the first place, a destination of the arms to the heirs-male of the grantee George Falconer Mackenzie; such destinations are not inserted in a mere matriculation. Secondly, there is appended to this entry in the register a memorandum, of date 16th January 1826, by Mr E. W. A. Hay, then Lyon Clerk, to the following effect: 'The original grant of arms, bearing date 22nd May 1817, was this day produced by Fitz Strathearn, genealogist, of London, and compared by E. W. A. Hay, Lyon Clerk.' Thirdly, the grantee had no right whatever to bear a quarter containing the arms of Lord Falconer of Halkerton, as he was only the son of a daughter of a daughter (neither being heiresses or co-heiresses) of David Lord Falconer of Halkerton. If, therefore, the Lyon of the period thought fit to give Mr Falconer Mackenzie a quarter for Falconer he could only have done so by way of grant, and as he gave him the undifferenced Falconer arms he must have considered the Mackenzie coat a sufficient difference.

"4. (*b*) *If on succession, Whether they were matriculated by him in the character of heir-male of Francis Lord Seaforth or of a cadet of the house of Mackenzie, or in what character or characters ?*

"While, as I have mentioned above, the arms appear to have been recorded as a grant and not as a matriculation, the grantee is described as 'male representative of Francis last Lord Seaforth'; and his descent is briefly traced from the first Lord Kintail and collaterally from the first and second Earls of Seaforth. From this it would appear that had he not quartered the Falconer arms, for which a grant was necessary, he would presumably have recorded those of Mackenzie as a matriculation.

"5. *Whether in accordance with the law and practice of Heraldry it is lawful for the Lord Lyon to grant to a stranger in blood to any person the achieve-*

ment of arms belonging to that person—(a) undistinguished in any way, or (b) if the shield is quartered with other arms?

"(*a*) No instance occurs to me of a stranger in blood being assigned the undifferenced arms of another. But I may mention a case which to some extent bears on this point. Unfortunately the narrative in the register is not very clearly drawn up, but the following facts appear to be correct. Mr William Henry Miller of Craigentinny executed a disposition on 16th October 1827 and a deed of entail on 20th April 1829, whereby he conveyed to himself and the heirs of his body, whom failing to Miss Sarah Marsh daughter of Thomas Marsh of Wheatley, co. York, and others therein mentioned, his estate of Craigentinny on condition that the said heirs of his body and heirs of tailzie and provision should assume the surname of Miller and bear the arms of Miller of Craigentinny. The entail was revoked in 1848, but Miss Sarah Marsh ultimately acquired the lands, presumably under the disposition of 1827. Mr Miller having expressed his desire that those succeeding him should perpetuate the surname and designation of his family, and bear and use appropriate armorial ensigns, Miss Marsh applied to the Lyon in 1859 for a grant of arms. As a matter of fact no arms had previously been recorded for Miller of Craigentinny, but the difficulty was got over by her being granted a coat which was not stated in the patent to be the arms of Miller of Craigentinny, but which was founded on what may be called the generic Miller arms (though I am not aware that they were ever actually borne by anybody), viz., a cross moline, and this was differenced by the cross being charged with five lozenges, which were probably assigned because an English family of the name of Marsh bears lozenges on its shield. There is no evidence to show that Miss Marsh's family was armigerous. The subsequent history of the Craigentinny arms is interesting, but does not concern the point in discussion. I only mention it to show that Miss Sarah Marsh, who was, so far as I know, a complete stranger in blood to Mr Miller (she is called, no doubt, a cousin in the article on Mr Miller in the *Dictionary of National Biography* but I can find no evidence of this either in the Lyon Register or in the proceedings in the case of *Miller* v. *Marsh*, 15 Dunlop, 823), got these arms destined 'to her and her successors taking the name and designation of Miller of Craigentinny.' The fact that the cross moline was charged with lozenges did not constitute a real heraldic difference, there being no known arms of a plain cross moline without some other charges in the coat; but the arms were evidently granted to Miss Marsh on the footing that they were to represent in future the arms of Miller of Craigentinny.

"(*b*) Differencing a coat by quartering other arms with it is a perfectly well-known method, and frequently occurs in the Lyon Register. To name only a few instances—amongst the Mackenzies themselves, Mackenzie of Coul bears the undifferenced arms quartered with Chisholm; Gairloch the same quartered with Fraser, and a wolf's head in the centre of the shield for Bain; while the petitioner himself bears the undifferenced arms of the Earl of Galloway quarterly with those of Mackenzie. In other families the Duke of Argyll bears Campbell quartered with the galley of Lorne, while the Marquess of Breadalbane bears exactly the same arms with the addition of a quarter for Stewart. The case of the Earl of Glasgow, too, may be mentioned. For two of his quarterings he took the undifferenced arms of the Earls of Burlington as arms of affection, the other two quarters bearing the arms of the earldom; his own paternal coat, that of the Boyles of Kelburn, being relegated to an escutcheon of pretence in the centre of the shield.

"6. *Whether the quartering of the Falconer and Fraser arms with the undifferenced Mackenzie arms on the respondents' achievement granted in* 1908, *had or has the effect of differing the armorial insignia on that grant from those of the chief?*

"For the reasons given in the answer to the second part of the previous question I am of opinion that in accordance with usual practice the addition of the Falconer arms to the respondents' coat was sufficient to difference it from the arms of the chief of the Mackenzie clan. The same thing occurred in the petitioner's arms when a Stewart quarter was added to that of Mackenzie.

"7. *Whether the respondents are strangers in blood to the house of Kintail?*

"The petitioner says they are, or at all events that they are not a legitimate branch of the house, being descendants of a Mr Kenneth Mackenzie, who was vicar of Conventh, and therefore as a priest incapable of having any legitimate issue. He cites in support of this contention statements from Highland genealogies by Mackenzie of Applecross and 'a person of quality,' who is believed, probably rightly, to have been the first Earl of Cromarty. From much personal experience of such genealogies I do not consider that the statements of either of these writers can be accepted without further corroborative evidence, and as historians neither of them can be relied on as always accurate. Mr Skene especially (Celtic Scotland, iii, 351 *et seq.*) has pointed out that the Earl of Cromarty has either invented or credulously accepted evidence which he shows to be worthless. His veracity therefore as a family historian must be seriously questioned.

"The facts about the alleged priest, the vicar of Conventh, are certainly obscure. We are not only told by Sir Robert Douglas in his Baronage of Scotland that he married, but a reference is given to the marriage contract and the amount of tocher which was paid with his wife. But the respondents say that they are not necessarily descended from Mr Kenneth at all, and they produce an advocation by Alexander Mackenzie of Davochmaluak against John Mackenzie of Ord, dated 1st January 1639,

The advocation takes exception to the judge before whom the original action was called, Sir John Mackenzie of Tarbat, Sheriff of Inverness, on the ground that he was a kinsman of the original pursuer John Mackenzie of Ord, the admitted ancestor of Mrs Fraser Mackenzie. Whether the actual grounds on which this assertion was based, viz., that they were 'thirds' and 'fourths' of kin, were technically correct was questioned by the petitioner's counsel, but the broad fact remains that they are stated to be 'notourlie knawin' to be full brethren of the house of Kintail. Now an assertion like this made in open Court, and patent to the criticism of many relatives, neighbours, and other persons who must have known the family well, has in my opinion considerable weight, and is more credible than the statements made either by the person of quality or by Mackenzie of Applecross writing as they did a generation after the date of the advocation.

"I am still more impressed by the fact that while Lord Cromarty traces the descent of the family of Mackenzie of Suddy from Mr Kenneth, the representative of this very family recorded his arms in the Lyon Register in 1678-9 apparently as legitimate, for he got the usual Mackenzie arms surrounded with a gold bordure embattled for difference. There is not a hint of illegitimacy in such a coat and there is no mark of bastardy about it. It is inconceivable that Sir Charles Erskine or his son Alexander, who was associated with his father in the office of Lyon for some years before the death of the latter in 1677, should not have been aware of the illegitimate origin of this family of Suddie had such been the case."

Against that interlocutor the petitioner appealed, and argued—The interlocutors of the Lyon being of an inferior judge should have contained findings in fact and in law, so that in any event those interlocutors should be recalled and the case remitted to the Lyon to pronounce appropriate findings—*Kilgour* v. *Brown & Shand*, 1852, 14 D. 441; *Campbell* v. *Caledonian Railway Company*, 1852, 14 D. 441; *Glasgow Gaslight Company* v. *Glasgow Working Men's Total Abstinence Society*, 1866, 4 Macph. 1041, 2 S.L.R. 180; *Melrose* v. *Spalding*, 1868, 6 Macph. 952, 5 S.L.R. 614; *Mackay* v. *Mackenzie*, 1894, 21 R. 894, 31 S.L.R. 746. The respondent was not entitled to the achievement of arms set forth in the interlocutor of which reduction was sought. She was a stranger in blood to the Mackenzies of Seaforth. The alleged relationship between John Mackenzie of Ord and Kenneth Lord Kintaill was not proved, the remoter individuals in it were quite mythical, and the whole proof depended on the inferences to be drawn from a copy advocation. That was incompetent evidence, and there was no evidence whatever that any such advocation was ever proceeded with, much less that it was successful. The female respondent was not descended from the same *stirps* as the Allangrange Mackenzies, and she could not possibly be the head of a family, for she had a brother alive. Further, the achievement of arms in question was not the arms of Allangrange, which under the entail she was bound to use, and for a grant of which she had applied to Lyon. The entail of 1812 bound the heirs-substitute to use the arms of Allangrange; Allangrange had been a barony since 1699; it was scarcely credible that at that date no arms of Allangrange were in existence. But if not, then arms of Allangrange could have been obtained from Lyon. The arms referred to in the entail were therefore existing arms or arms which the Lyon would then have granted to an heir of entail applying for them. At that date Francis Lord Seaforth was then alive, he was the heir-male of Kenneth Lord Kintail, and if as head of the house he was entitled to the Seaforth Arms without mark, no one else could have had right to use the Seaforth arms undifferenced. But, as would be shown *infra*, Francis Lord Seaforth was certainly entitled to bear the Seaforth arms without mark indicative of cadency. If therefore the achievement of arms of the female respondent was or contained the Seaforth arms without any mark indicative of cadency she had no right to them. The achievement of arms of the respondent was exactly the same as the achievement of arms of George Falconer Mackenzie 4th of Allangrange, with the exception that a quarter for Fraser was substituted for one of the quarters for Falconer. George 4th of Allangrange obtained his achievement of arms on 22nd May 1817. Francis Lord Seaforth was then dead without male representatives, and George 4th of Allangrange was the heir-male of Kenneth Lord Kintaill, and as such head of the Mackenzies of Seaforth. That relationship was the basis of his application for arms; he was granted Seaforth supporters and the achievement was destined to the heirs-male of his body, who were included, no doubt, in the heirs of entail of Allangrange but were different from them. Further, prior to his succession the lairds of Allangrange could not have quartered Falconer for they had no connection with the Falconers. It was therefore clear that those arms which he obtained were not the arms of him as heir of entail of Allangrange but of him as head of the Mackenzies of Seaforth. The same achievement was borne by his sons, but they also were heads of the Seaforth family. Even assuming that the arms of 1817 were the arms of Allangrange, the respondent could not legally obtain a grant of them, for arms were enjoyed by a family as matter of right and were hereditary within it; they were not disposable by will by a member of the family to a stranger in blood such as the respondent was—Nesbit, System of Heraldry, vol. i, chap. ii; Mackenzie's Collected Works, vol. ii, chap. xxi, pp. 615-616. Any member of the family could object. *M'Donnell* v. *M'Donnell* (the *Glengarry* case), 1826, 4 S. 371, was distinguished, for here the appellant was an undoubted member of the family. The fact that in her achievement of arms the stag's head was quartered with Falconer and Fraser was not sufficient to distinguish it from any arms to which the petitioner had right. "To difference" was

in heraldry a term of art meaning to mark with some sign indicative of cadency, *i.e.*, that the individual in question was not entitled to the plain arms. Cadency was marked in various ways, but originally quartering was not an indication of cadency but was a form of marshalling or composing arms used when an individual had right to more than one coat—Stevenson, Heraldry in Scotland, i, 173; Mackenzie's Collected Works, vol. ii, chap. 24, p. 623, *et seq.* But quartering came to be a recognised method of indicating cadency — Seton, Scottish Heraldry, p. 96 and p. 101, *et seq;* Nesbit, System of Heraldry, vol. ii, part 3, chap. 1, pp. 20-21; Stevenson, Heraldry in Scotland, vol. ii, p. 301—and was therefore ambiguous, for it might or might not be indicative of cadency. But in the present case the Seaforth arms in the coats of the lairds of Allangrange were not marked for cadency by the quartering with Falconer, and in like manner in the respondent's arms were not marked by the quartering for cadency. In any event the respondent was not entitled to supporters. The Lyon had a strictly limited mandate as to supporters; supporters would only be granted to certain classes of persons entitled to have them, and the Lyon had no right to give supporters to one not of those classes—Mackenzie's Collected Works, vol. ii, chap. 31, p. 630 *et seq.*; Stevenson's Heraldry in Scotland, vol. i, p. 34, vol. ii, p. 317 *et seq.*; Seton, p. 285. The Lyon's function was solely to decide whether a particular applicant came within the classes who were entitled to supporters. In the present case the female respondent did not ask Lyon for supporters, and she was not within any of the classes entitled to supporters. The petitioners had a title to challenge the respondent's right to the arms in question, for they infringed his armorial rights. Prior to the Act of 1708 (7 Anne, cap. 21), section 3, attainder did not in Scotland involve corruption of blood; attainder did involve forfeiture of arms, but that was confined to the attainted person and did not affect either his descendants or his collaterals. Corruption of blood was introduced by that Act, and its effect was to deprive the attainted person and all others claiming right through him of all right to the arms he bore at the date of attainder. Those arms did not cease to exist as a heraldic entity — Mackenzie's Collected Works, vol. ii, chap. 23, p. 621; Nesbit's System of Heraldry, vol ii, part iii, p. 39. Persons who had right to them through others than the attainted person and those of his corrupt blood were entitled to those arms. The fifth earl was the heir-male of Kenneth Lord Kintail at the date of the attainder, and his arms were the undifferenced arms. While male descendants of his were in existence it was not certain whether any other members of the family not affected by corruption of blood could take the undifferenced arms, but with the extinction of the male descendants through males of the attainted earl, Thomas Frederick Mackenzie Humberston became heir-male of Kenneth Lord Kintail, and as such was entitled to the undifferenced arms. That was shown by the case of *Maclean of Dowart*—Balfour Paul, Ordinary of Arms, p. 4—and the *Southesk* case. The result was the same as if there had been no attainder, except that the other descendants of the attainted earl were still affected by corruption of blood. Francis Lord Seaforth was also entitled to the undifferenced arms. Lady Hood was the heiress of Francis Lord Seaforth, for she got his estates. She was his heir of line and was also heir of line *quoad* the family arms, for the descendants of the attainted earl were corrupt in blood. No doubt an heir-male of Kenneth Lord Kintail was to be found in the Falconer Mackenzies, but even in a competition with him Lady Hood was entitled to the undifferenced arms either to his exclusion or concurrently with him—*Cuninghame* v. *Cunyngham*, 1849, 4 D. 1139, *per* Lord Fullerton at p. 1150, and Lord Jeffrey at p. 1151; Seton's Scottish Heraldry, pp. 353 to 357. Further, that right was recognised in 1815, when Lady Hood and her heirs-male got the undifferenced arms. Further, Lady Hood would have got a grant of the arms as heiress of entail. Prescriptive possession had followed on the grant of 1815. The petitioner was also heir of line, and as the Falconer Mackenzies were extinct there was no heir-male to compete with him. This right as heir of line had been recognised by the matriculation of 1890 in his favour. As descendant of an heiress he could quarter his paternal and maternal coats—Mackenzie's Collected Works, vol ii, chap. 24, p. 622—but it was also his right to drop his paternal coat and use the maternal coat only, *i.e.*, Lady Hood's arms, which were the undifferenced Seaforth arms—Nesbit's Heraldry, vol. i, p. 139 on the Arms of Napier of Merchiston; p. 259 on the Arms of Sutherland; Seton, p. 116, referring to Mackenzie, and p. 357; Stevenson's Heraldry in Scotland, p. 145. The respondent's arms therefore infringed the petitioner's, as both included the Seaforth arms undifferenced to which the petitioner had right. *Muir* v. *Graham*, 1794, M. 15,537, merely decided that where there was an arms clause in an entail but no existing arms to which it could apply arms should be obtained from Lyon to satisfy that condition. *Procurator-Fiscal of the Lyon Court* v. *Murray of Touchadam*, 1776, 5 B. Supp. 490, showed there was a right of appeal against Lyon, and concealment of material facts, as was proved in the present case, was a ground for upsetting a grant by Lyon—*Dundas of Dundas* v. *Dundas of Fingask*, 1762, 5 B. Supp. 493. The following were also referred to—Stair, iii, 5, 35; Ersk. iii, 8, 3 to 6; Hubbard, Evidence of Succession, p. 92; Stevenson's Heraldry in Scotland, p. 318; the Acts 1592, cap. 125 (Record Ed., cap. 29), 1669, cap. 95, 1672, cap. 21 (Record Ed., cap. 47); Nesbit's System of Heraldry, ii, part iv, cap. vii; and Seton's Scottish Heraldry, pp. 318 and 319.

Argued for the respondents—The arms of the respondent in no way infringed the armorial rights of the petitioner; her

achievement of arms was entirely different from the petitioner's; it was not merely differenced. Lady Hood's arms dated from 1815; the Allangrange arms dated from 1817. Those two dates were so close that it was highly improbable the Lyon would have granted to Allangrange the arms he had just granted to Lady Hood. There was no property in a crest at all—Stevenson's Heraldry in Scotland, p. 185. The female respondent was entitled to supporters; supporters had originally been granted by Lyon in 1817, and rightly granted, for Allangrange had been a barony at that date for about a century, and as representatives of the lesser barons the Allangrange family were amongst those entitled to supporters—Stevenson's Heraldry in Scotland, p. 322. Lyon had sole jurisdiction to decide who were entitled to supporters, and in practice grants of supporters were not confined to the eight classes enumerated in Stevenson's Heraldry in Scotland, p. 311 *et seq.* Those eight classes were entitled as of right to get supporters, but Lyon had a discretion to give supporters to others not of those classes. The only limitation in the Lyon's jurisdiction was that he could not bestow the supporters of the prince—Mackenzie's Collected Works, ii, chap. 31, p. 631. There were many instances of persons receiving supporters who were not within the eight classes—Nesbit's System of Heraldry, ii, part iv, pp. 30 and 33; Seton's Scottish Heraldry, p. 315 and 317 *et seq.* If the respondent had rightly obtained supporters, the petitioner could not question the supporters given to her, as there was no exclusive right of property in particular supporters, the same supporters being used by many families — Nesbit's System of Heraldry, ii, part iv, p. 33. In any event the supporters of the female respondent's shield were different from the petitioner's supporters and the ancient Seaforth supporters included the greyhound. Further, the Seaforth supporters were absolutely abrogated by the forfeiture. The female respondent had proved her descent from an ancestor common to her stirps and that of Kenneth Lord Kintail. On proof of descent the following were referred to — Skene, Celtic Scotland, vol. iii, p. 351; Douglas, Baronage of Scotland, vol. i, pp. 415-417; Nesbit, System of Heraldry, vol. i, pp. 336-337. She was a cadet of the Mackenzie family, and in any event entitled to the Mackenzie arms suitably marked to indicate cadency. Quartering with other arms was a sufficient indication of cadency — Mackenzie, Collected Works, vol. ii, chap. 21, p. 618; Nesbit, System of Heraldry, vol. ii, part iii, p. 21; Seton, Scottish Heraldry, p. 101; Balfour Paul, Ordinary of Arms, Nos. 3400 and 3401, p. 230. In any event as the result of her succession under the entail containing the name and arms clause, the female respondent was heraldically adopted into the family and was entitled to its arms — Nesbit, Armouries, p. 116; Mackenzie, Collected Works, vol. ii, chap. 21. Further, the petitioner had no title to impugn the female respondent's arms. As common law heir, the petitioner was entitled to the Conansbay arms, *i.e.*, the Seaforth arms suitably marked to indicate cadency which might be done by quartering. He was not, however, entitled to more than the Seaforth arms quartered with his paternal arms. If Lady Hood was an heiress and her husband armigerous, she could only transmit to her descendants a right to quarter her arms with her husband's. Such quartering might be used to indicate cadency, but it excluded a right to the undifferenced arms in the petitioner. As heir of entail the petitioner had to bear the arms of Mackenzie of Seaforth—he did not deny that the arms he had obtained from the Lyon satisfied that condition and were the arms of Seaforth, but these arms were quite different from the arms of the respondent. In the succession to arms certain arms belonged to the chief and the succession to them could not be divorced from the chieftainship. The petitioner being descended from a woman could not claim the undifferenced arms. Further, apart from questions of forfeiture, the petitioner was not the senior heir-female; there were heirs-female in existence descended from the attainted earl, so that if the petitioner could take rights through females, the heirs-female of the attainted earl could also have done so in priority to him. Further, the result of the attainder was to extinguish completely any right by succession to the undifferenced arms; they were destroyed as a heraldic entity—Bankton, iii, 3, 49; Erskine, iv, 4, 24; Hume on Crimes, i, 26, p. 546; 7 Anne, cap. 21; Mackenzie, Science of Heraldry, p. 78. In any event, however, so long as an heir-male descendant from the attainted person was in existence, *i.e.*, a person by relationship in fact entitled to the undifferenced arms but debarred by law from using them; other members of the family were in fact cadets and might have right to the differenced arms, but it would have been heraldically untrue for them to use the undifferenced arms, and there was no practice to show the reverse. The same must apply where heirs-female affected by the forfeiture existed. Their existence could not be ignored to the advantage of another heir-female not subject to forfeiture such as the petitioner was. Further, the right to arms did not run with the lands but with relationship, and in any event the petitioner's right to the lands was by purchase not by succession. Further, he had not obtained the lands in substance but only a small part of them; *Cunningham's* case (*cit.*) did not apply. *Hunter* v. *Weston*, 1882, 9 R. 492, 19 S.L.R. 416, was referred to.

At advising—

LORD JUSTICE-CLERK—This is a petition raised before the Lyon King, in which the petitioner asks for reduction of an interlocutor by the Lyon of 7th February 1908, and for deletion thereof from the Lyon's Register, or in any event of that part thereof dealing with supporters, and to find that the respondents have no right to certain ensigns armorial, recorded on 22nd May 1817, or in any event to the supporters therein.

On 21st October 1918 the Lyon, after certain procedure, dismissed the petition. In his note he stated that he had dealt only with the questions raised as to the supporters. On appeal, after hearing parties at length, it appeared that certain of the points which the Lyon had not dealt with were still in material controversy between the parties, and we recalled the interlocutor of the Lyon *hoc statu*, and remitted the case to him for reconsideration, and to deal specifically with certain questions which were adjusted by the parties as in their opinion material to the case. The Lyon, without pronouncing special findings, adhered to his original judgment, and the present appeal has been taken against his decision.

The petitioner apparently sues as heir of line, as he pnts it, of the House of Seaforth. His position seems to be this. He is by blood, so far as heraldic descent is concerned, not a Mackenzie but a Stewart. His grandmother, Dame Mary Hood Mackenzie of Seaforth, married first Admiral Sir Samuel Hood, Baronet, and claimed (though this is not admitted by the respondent) to be heir of line of Kenneth third Earl of Seaforth, who died in 1678. After Sir Samuel Hood's death in 1814 *sine prole*, she, while still a widow, matriculated in 1815 the combined arms of Hood and Mackenzie of Seaforth. These arms are shown in Plate IV. Thereafter she married James Alexander Stewart, a cadet of the Earl of Galloway's family, and had issue by him. Her eldest son, Keith, was the father of the present petitioner.

Kenneth Mackenzie, who but for the attainder in 1715 of William fifth Earl of Seaforth, his grandfather, would have been seventh Earl of Seaforth, executed a minute of sale between, *inter alios*, the said Kenneth and his cousin, Thomas Frederick Mackenzie Humbertson, dated in 1779, by which the latter, on the terms therein set forth, bought from the said Kenneth certain of the Seaforth estates. By the disposition which followed thereon in 1781 the said Kenneth disponed the said Seaforth estates to the said Thomas Frederick Mackenzie Humbertson and his heirs and assignees whomsoever. The last named, who but for said attainder would have been eighth Earl of Seaforth, died in 1783, and was succeeded by his brother Francis, but for said attainder ninth Earl of Seaforth. The last named, Francis, died on 11th January 1815, having executed a deed of entail of the family estates on the heirs-male of his body, whom failing the heirs-female of his body, and the other heirs therein mentioned, under, *inter alia*, the condition "that each of the heirs, substitutes, and successors before mentioned who shall not succeed to my title and dignity, and the husbands of the heirs-female, shall assume and constantly retain, use, and bear the surname, arms, and designation of Mackenzie of Seaforth as their own proper surname, arms, and designation in all time after their succession to the said lands and estate, but with liberty, in case of their succession to any other settled estate or estates, to join the name and arms of any other family to the said name and arms." He was succeeded on his death without male issue by his daughter (the eldest of several), the said Dame Mary Hood, afterwards Stewart, who took the estates under the said last-mentioned entail, and matriculated the arms aforesaid on 14th August 1815.

Her grandson, the petitioner, thus succeeds through a female, and takes under the said last-mentioned deed of entail. The petitioner, who succeeded his father in 1881, on 21st January 1890 matriculated armorial bearings, as shown in Plate VI. These arms are, of course, accepted by the petitioner as his proper arms.

Has the petitioner, then, a sufficient title and interest to challenge the respondent's arms, as shown in Plate VII, or the supporters thereof?

The respondent has matriculated what are claimed to be the arms of Allangrange, comprising the arms of Mackenzie quartered with the arms of Fraser of Bunchrew and of Falconer.

The estate of Allangrange was acquired in 1664 by Simon Mackenzie, first of Allangrange. His great-great-grandson, James Fowler Mackenzie of Allangrange, by disposition and deed of entail of 1877, entailed the estate of Allangrange on the respondent Mrs Beatrice Anna Fraser Mackenzie. By said deed of entail it is provided "that the said Beatrice Anna Mackenzie and each of the heirs of entail, and the husband of each of the female heirs of entail, who shall succeed to the lands before disponed, shall be obliged in all time coming, after succeeding to the said lands, to use and retain the surname of Mackenzie and arms and designation of Mackenzie of Allangrange without prejudice to his or her using and retaining therewith any other surname, arms, or designation."

In 1817 George Falconer Mackenzie, father of the said James Fowler Mackenzie, obtained from the Lyon a patent of arms, which runs as follows:—"To all and sundry whom these presents do or may concern, we, Thomas Robert Earl of Kinnoul, Lord Lyon King at Arms, do hereby certify and declare that the ensigns armorial pertaining and belonging to George Falconer Mackenzie of Allangrange, Esquire, male representative of Francis last Lord Seaforth, and only son of John Mackenzie of Allangrange, Esquire, by Catherine, daughter of the Honble. Jane Falconer, and grandchild of the Right Honble. Lord Halkerton, which George Falconer Mackenzie is great-great-great-great-grandson of Sir Kenneth Mackenzie first Lord Kintail, and great-great-great-grandnephew of Colin Lord Kintail, afterwards first Earl of Seaforth, and of George second Earl of Seaforth, sons of the said Sir Kenneth Mackenzie first Lord Kintail, are matriculated in the Public Registers of the Lyon Office, and are blazoned as on the margin thus, viz., quarterly, first and fourth azure, a buck's head cabossed Or, for Mackenzie; second and third azure, a falcon displayed argent, charged on the breast with a man's heart gules, between three mullets of the second, for Falconer.

Above the shield is placed a helmet befitting his degree, with a mantling gules, the doubling argent, and on a wreath of his liveries is set for a crest a mountain in flames proper, and in an escroll this motto, 'Luceo non uro.' On a compartment below the shield whereon is this motto, 'Vive ut vivas,' are placed for supporters two savages wreathed about the head and middle with laurel, and each holding in his exterior hand a baton erect, with fire issuing out of the top of it, their hair also inflamed, all proper. Which armorial ensigns and supporters above blazoned we do hereby certify and confirm to the said George Falconer Mackenzie of Allangrange, Esquire, and the heirs-male of his body, as their proper arms and bearing in all time coming."

The respondents in 1908 applied to the Lyon for ensigns armorial, founding, *inter alia*, on said deed of entail of 1877, whereupon the Lyon on 7th February 1908 granted the arms shown in Plate No. VII, being those complained of in this action. The said coat of arms comprises in its four quarters the Mackenzie arms in the first and fourth quarters, Fraser of Bunchrew's arms in the second quarter, and the Falconer arms in the third quarter. The achievement also carries as supporters two savages as above set forth on a compartment differing from any in the previous arms of the Seaforths.

We have to determine (1) whether an improper use has been made in said coat of arms, Plate VII, of the Mackenzie arms as regards the first and fourth quarters, viz., azure a buck's head cabossed Or, and (2) whether an improper use has been made of the supporters in Plate VII, of which the petitioner is entitled to complain.

It appears from the authorities to which we were referred that a buck's head cabossed Or on a shield azure is a very common emblem in heraldry. It is quartered by Mackenzie of Gairloch, by Mackenzie of Coul, by Mackenzie of Tarbat and Scatwell, by Muir Mackenzie of Delvine—all of these being branches of the Seaforth House (Muir Mackenzie by marriage)—by Callander of Craigforth, Dingwall Fordyce, Stewart of Grandtully, and by some of the Macleods (Muiravonside), and by Viscount Tarbat, Earl of Cromarty (see Nisbet's Heraldic Plates, opp. p. 112). But it is undoubtedly the arms of Mackenzie of Seaforth, as is indeed not disputed by the defenders.

I do not think it necessary to deal at length with all the points that were argued before us. Some of these do not seem to me to have been very well settled or defined, and I think from many of the best recognised rules of Scottish heraldry exceptions on one ground or another have sometimes been allowed, and we have to rely on the rules of Scottish heraldry, which differ apparently so far as the questions in this case are concerned materially from those which obtain in England. One or two questions of general heraldic importance so far as this case is concerned, it appears to me, must be considered, and according as they are answered may conclude the controversy between the parties in this case.

I put in the place to be dealt with in the first instance, How far is quartering to be recognised as sufficient as a difference? The petitioner's arms are very different in appearance from the coat complained of. The Lyon is of opinion that quartering of a coat of arms is a sufficient difference from the original coat. In the present case the emblem in question is a buck's head cabossed Or on a shield azure, which the Lyon has quartered with other two coats and so composed the coat complained of, the Mackenzie arms in the first and fourth quarters being, as I have said, quartered with the arms of Fraser of Bunchrew in the second quarter and the arms of Falconer in the third. The present Lyon, from whom this appeal is taken, considers this quartering a sufficient difference, and so apparently did his predecessor in office. But the appellant maintains that this view is indefensible or at least unsound. In my opinion the authorities support the result which the Lyon adopts.

In his note of 21st October 1918 the Lyon says—"George Falconer Mackenzie of Allangrange, the male representative of that Francis Lord Seaforth who was created a Baron of the United Kingdom in 1797, recorded in the Lyon Office in 1817 the undifferenced arms of Mackenzie quarterly with those of Falconer, his mother having been a granddaughter of Lord Halkerton. He also got the Mackenzie crest of a mountain in flames, and for supporters two savages wreathed about the head and middle with laurel, each holding in his exterior hand a baton erect with fire issuing from the top of it, their hair also inflamed. George Falconer Mackenzie was succeeded by his two sons successively, John Falconer and James Fowler Mackenzie. The latter died in 1907, having made an entail of his property in favour of Mrs Beatrice Anne Fraser, wife of Robert Scarlett Fraser of Bunchrew, who are the respondents in this case." In his note of 21st November 1919 the Lyon says—"The petitioner and appellant on 21st January 1890 matriculated the Seaforth arms quarterly with those of Stewart of Galloway, neither coat being in any way differenced, thus showing that the quartering of the coats was considered a sufficient difference. This was the last matriculation granted by my predecessor Dr George Burnett three days before his death. On the death of Francis Lord Seaforth in 1815 George Falconer Mackenzie of Allangrange, as heir-male of the first Lord Kintail and of the first Earl of Seaforth, would but for the attainder have succeeded to the dignities and arms. Of the latter he got a fresh grant in 1817 quarterly with those of Falconer Lord Halkerton, his mother being a daughter of James Falconer of Monkton by his wife Jean, a daughter of David fifth Lord Falconer. Both the Mackenzie arms and the Falconer arms were given undifferenced, though it is difficult to see how the latter was so treated, as James Falconer of Monkton could not possibly have had a right to them. They were, no doubt, the arms of George Falconer Mackenzie's grandmother, but as she was not an heiress

she could not transmit her arms to her descendants. It can only be supposed that the quartering was again considered a sufficient difference." Later on in the same note, referring to the matriculation in 1817 to George Falconer Mackenzie, the Lyon says —"If therefore the Lyon of the period thought fit to give Mr Falconer Mackenzie a quarter for Falconer, he could only have done so by way of grant, and as he gave him the undifferenced Falconer arms he must have considered the Mackenzie coat a sufficient difference." And still later he adds— "(*b*) Differencing a coat by quartering other arms with it is a perfectly well-known method, and frequently occurs in the Lyon Register. To name only a few instances— Amongst the Mackenzies themselves, Mackenzie of Coul bears the undifferenced arms quartered with Chisholm; Gairloch the same quartered with Fraser, and a wolf's head in the centre of the shield for Bain; while the petitioner himself bears the undifferenced arms of the Earl of Galloway quarterly with those of Mackenzie. In other families the Duke of Argyll bears Campbell quartered with the galley of Lorne, while the Marquess of Breadalbane bears exactly the same arms with the addition of a quarter for Stewart. The case of the Earl of Glasgow too may be mentioned. For two of his quarterings he took the undifferenced arms of the Earls of Burlington as arms of affection, the other two quarters bearing the arms of the earldom, his own paternal coat, that of the Boyles of Kelburn, being relegated to an escutcheon of pretence in the centre of the shield. . . . For the reasons given in the answer to the second part of the previous question, I am of opinion that in accordance with usual practice the addition of the Falconer arms to the respondents' coat was sufficient to difference it from the arms of the chief of the Mackenzie clan. The same thing occurred in the petitioner's arms when a Stewart quarter was added to that of Mackenzie."

In my opinion the view thus taken by the Lyon as to the effect of quartering is sound. Mackenzie, cap. xxi, p. 618, says—"These cadets who have their arms quartered with other arms need no difference, for the quartering or empaling is a sufficient difference, as is clear in the example of Campbell of Glenurchy, Home of Renton, and others."

Nisbet is to the same effect—"Quartering," he says, "is looked upon as a sufficient and regular brisure in the best of our families, and especially by second sons"; and in Part iii, cap. i, p. 21, he refers to several coats where the only difference is created by quartering with other arms. In the previous page he says—"With us 'tis a frequent practice for younger brothers to add to their paternal bearings some part of their mother's arms to differentiate themselves and show their alliance with other families. And these coats are all called *composed arms*, because they are two coats join'd in one shield, without distinction of quarter. This way of difference is much approven of by Dugdale."

As examples of the employment of undifferenced arms without any other distinction than what is to be inferred from quartering, I refer to the arms of the house of Hay, of which the Earl of Erroll is the head (Stevenson's Heraldry of Scotland, opp. 148). The Marquis of Tweeddale bears on his coat overall the paternal coat of Hay as arms of pretence. The Earl of Kinnoull carries the same Hay arms in his first and fourth grand quarters. The same mode of differencing is found in different branches of the Seaforth Mackenzies. So too Nisbet says (Part iii, cap. i, p. 19)—"These who were advanced by kings, princes, and other great lords did many time bear their whole coats, or some part of the arms of these who advanced them, and joined them with their own paternal bearing, which served very aptly, not only to difference them from the principal families whereof they were cadets, but also to show their gratitude and acknowledgment of benefits received from some honourable friend or superior." On the following page he mentions specially quartering as the "eighth way proposed to difference descendants from the principal house and one from another."

The Lyon is, as I have said, of opinion that such quartering was in this case a sufficient difference to justify him in giving the respondents the arms shown on Plate No. VII, and in this I think he is right. The respondents applied to him for a coat of arms founding on the deed of entail of Allangrange by James Fowler Mackenzie in favour of the respondent Beatrice Anna Mackenzie, under which she was the institute, dated said deed of entail 26th May 1877. Under that deed the said respondent is heir of entail in possession of Allangrange, and in her petition of 1908 to the Lyon she referred to and founded on the said grant of 1817 in favour of George Falconer Mackenzie. The patent of 1817 sets forth that the ensigns armorial pertaining and belonging to George Falconer Mackenzie of Allangrange, Esq., male representative of Francis last Lord Seaforth, and only son of John Mackenzie of Allangrange, Esq., are as set out in Plate V, and the said patent concluded thus—"Which armorial ensigns and supporters above blazoned we do hereby certify and confirm to the said George Falconer Mackenzie of Allangrange, Esquire, and the heirs-male of his body as their proper arms and bearing in all time coming. In testimony whereof, &c. Dated 22nd May 1817." The Lyon did not in 1908 repeat the said arms of 1817, but authorised a very different coat in respect of the respondent's position relative to the Frasers of Bunchrew, whose arms were inserted in the second quarter of the 1908 matriculation. In this matter the Lyon was in my opinion acting in the discharge of what Lord Kames calls the ministerial duty of giving arms, and a great part of the Lyon's office is ministerial—Ersk. i, 4, 33. In my opinion the petitioner is not entitled to challenge the coat of arms so matriculated in 1908. It has been granted, and in my opinion rightly granted, by the Lyon to the respondents, and does not in any way infringe upon the petitioner's coat of arms as matriculated in 1890 and shown on Plate VI, or on any other right of the

petitioner. I do not think the petitioner is entitled to buttress his own title, as apparently he desires to do, by any title there may be in what the petitioner calls the house of Seaforth.

The Lyon was approached by the respondents in 1908, *inter alia*, on the ground that they had succeeded in virtue of the said deed of entail of 1877, which had come into effect on the death of the granter thereof in 1907, for a grant of arms in terms of the provisions thereof—a name and arms clause as aforesaid. I incline to agree that the owner of landed estate has not an absolute power to dispose of the right to the arms which he is entitled to bear in the same unfettered way as he can dispose of his landed estate. On the other hand, in heraldry, there is a linking of the estate with the arms so far as the carrying out of the entailer's appointment as to the name and arms is concerned. The Lyon's functions and powers are, as I have said, to some extent ministerial and discretionary, though in neither of these respects are they unqualified or absolute so as to prejudice the clear right of others so far as arms are concerned. But the heraldic law on the point is by no means clear, and Scottish heraldic practice has been far from consistent. Seton (p. 373), after discussing the matter in some detail, referring to the family of Wellwood of Garvoch, says—"Here, therefore, we have two families bearing arms in all respects identical; the one in virtue of a deed of entail, and the other in the capacity of the heir-general"; and he gives that merely as an example of "cases" where the identical coat of arms may be borne by two different families. Then, referring to the decision in Moir's case, he adds—"There appears to be no reason why the Lord Lyon should not take steps to prevent such irregularities by the due exercise of his '*undoubted powers*' by granting to the heir of entail a new coat of arms, composed of old elements sufficiently distinguished or differenced." I am of opinion that it was "incumbent" on the respondents, in following out the entailer's (James Fowler Mackenzie's) appointment as regards carrying the name and arms of Mackenzie of Allangrange, to apply to the Lyon as they did in 1908; and that the Lyon has not acted contrary to the law and practice of heraldry, or acted contrary to his "undoubted powers" in pronouncing the interlocutor of 7th February 1908. As a result the appellant is, in my opinion, not entitled to have the said interlocutor reduced, rescinded, or annulled. The petitioner and appellant himself has only right (assuming him to have such right) by virtue of an entail and the authority of the Lyon to the Mackenzie arms; and I do not think he can successfully challenge the respondents' right to use the Mackenzie arms as they appear in the coat shown on Plate VII, to which the Lyon has given his imprimatur and authority according, as I think, to due process of law. The two coats—the petitioner's of 1890 and the respondents' of 1908—are vastly different, and the difference is, in my opinion, such that the latter does not infringe any right of the petitioner as entitled to the former.

Supporters.—But the petitioner and appellant says that in any event the matriculation complained of cannot be sustained in so far as it authorised the respondents to use the supporters shown in Plate VII.

This raises a question depending on considerations quite different from those with which I have hitherto been dealing. In the result, however, I am of opinion that in this respect also the appellant's contentions are unsound, and cannot be given effect to.

The origin and purpose of supporters in heraldry is obscure, and the authorities are not agreed on these matters, but in my opinion, so far as the present case is concerned, the position is tolerably clear.

The petitioner, claiming to represent the House of Seaforth, claims that he is entitled to have it found that the respondents are not entitled to supporters at all, and further, and in any event, that they are not entitled to the particular supporters in question. This contention proceeds on the view that the petitioner has not only a legal right to the supporters in question, but that he has a right of such a character that it entitles him to prevent others from using these supporters.

It may be conceded that the petitioner might have been entitled to use the supporters in question, but I do not think his right is of such a character as enables him to challenge the respondents for using the same supporters. In point of fact the appellant does not use the supporters which are in controversy. He has accepted other supporters as those in which he has right.

"According to Mackenzie (cap. xxxi) and other authorities," says Seton, p. 264, "Supporters are not hereditary, but may be altered at pleasure; 'if, however,' says Sir George [Mackenzie], 'cadets keep their chief's supporters, they use to adject some difference.'" Seton further, at the same page, refers to "the frequent practice of supporters being taken from the achievement of a family connection." And whatever be the position as to the heir of line as compared with the heir-male as regards the coat of arms, the rule as to supporters is thus put by Seton, p. 352—"The right to such distinction [*i.e.*, of supporters] passes, *not to the heir of line*, but to the *nearest heir-male* of the family, even though a distant collateral," and the petitioner cannot and does not claim to be heir-male of the Seaforth family. Seton (p. 352) quotes with approval from the report on the Lyon Court, 1822—"A grant of supporters to her [*i.e.*, the heir of line], therefore, or to her husband in her right, would be repugnant to all the laws and usages of heraldry." Accordingly we find that Dame Hood in 1815 did not receive as supporters two savages, but a greyhound on the right and a savage on the left. She was composing the arms of Hood and Mackenzie, and apparently the Hood family, of which Sir Samuel Hood, her deceased husband, was

a cadet, had at that date no supporters at all, and the present petitioner, when he matriculated his arms in 1890 obtained, according to the patent, on the dexter a savage, and on the sinister a greyhound as supporters. I am not clear as to how the greyhound came to be given as a supporter to the petitioner or his grandmother, but the only supporters either of them had differ materially from the two savages given to the respondents. Perhaps the Earl of Cromarty is right in saying that the supporters of the Mackenzies of Kintail were two deerhounds.

It may be noted that in the Douglas Peerage the Seaforth supporters are shown with heads not inflamed, and carrying the batons in their exterior hands and not on the shoulder, which may be taken as an example of minor alterations as to supporters made at pleasure.

The use of savages as supporters is very common, for (as Nisbet says, ii, 4, 34)—"It is allowed by the practice of heraldry for many different families to carry the same supporters without any ground of offence, or concluding them to be of one descent and kin; which practice is frequent with us, especially in using savages for supporters"; and among the examples he cites the Earl of Seaforth, and he adds, "many old barons carry savages, some of them with laurels about the heads and batons in their hands." To the same effect is Seton, 263.

But the petitioner contends that the respondent is not of the rank or class who are entitled to supporters, and that the Lyon has no power, discretionary or otherwise, to grant supporters to the respondent. In connection with this argument, however, it is noteworthy that apparently, according to the report of the commission on this matter in the first quarter of the last century, a different fee was allowed to the Lyon for supporters as of right and for supporters of the nature of a favour or discretionary grant.

The right to arms involves, no doubt, a question of property which may be vindicated and protected by the person in whom the property is vested, but I do not think these principles apply to the same extent at least to supporters. In my opinion the petitioner is not entitled to claim any right of property in the supporters to which he objects, and, as Lord Robertson put it in the case of *Macdonell*, 4 S., at p. 376, "popular actions are unknown in our law, and no one can bring an action to take from another what he himself has no right to."

Whether the Lyon has full discretionary power as to granting supporters may be open to question, but in my view, it does not require to be determined in order to decide the question in controversy between the present parties. In 1817 Mackenzie of Allangrange matriculated his arms; and the present Lyon in 1908 found the present respondent Mrs Fraser Mackenzie heiress of entail in possession of Allangrange, and he by his interlocutor granted her, *inter alia*, the supporters now complained of. In my opinion there is no law which negatives his right to do so or the respondent's right to continue to use said supporters, or which gives the petitioner a title to challenge the Lyon's judgment in this matter or the respondent's right to use the said supporters.

A question was argued before us as to the effect of the attainder of William Earl of Seaforth in 1715. I think the views expressed by the Lyon as to this are sound, and in my opinion that attainder raises no point which it is necessary to determine in order to decide this case.

I would have been very slow to interfere with the carefully-considered judgment of the Lyon in such a matter as we are now dealing with, though of course if we were satisfied that his judgment was erroneous it would be our duty to put him right. I do not think the Lyon has been shown to have erred; on the contrary, the conclusion at which he has arrived is in my opinion right and his decision ought to be affirmed.

In point of form the Lyon ought to have pronounced specific findings, and we must in our interlocutor do so, but the result is that the appeal, in my judgment, ought to be refused.

I may add that I see no reason to differ from the conclusion which the Lyon has reached as to the petitioner's contention that the respondent Mrs Fraser Mackenzie is a stranger in blood to the house of Kintail.

LORD DUNDAS—Having considered this appeal to the best of my ability, I am unable to discover any good ground for interfering with the decision of the Lord Lyon. Agreeing generally as I do with the opinion just delivered, and also with that which Lord Sands is about to deliver, which I have had an opportunity of reading, I have not thought it necessary to prepare a separate opinion of my own, and shall only say a few words.

The crucial question is, I think, whether or not the arms claimed by the respondents are sufficiently differenced from those of Mackenzie of Seaforth. In the note appended to his interlocutor of 21st October 1918 Lyon succinctly explains the manner in which, and the reasons for which, he in 1908 gave the respondents a grant of the arms depicted on Plate VII, and described in his interlocutor of 7th February 1908. Lyon informs us that differencing a coat by quartering other arms with it is a perfectly well-known method and frequently occurs in the Lyon Register. The text-writers seem to be of a similar opinion; *cf.* Sir G. Mackenzie, chap. 21, p. 618 (1722 edn.); Nisbet, vol. ii, part iii, p. 21; Seton, p. 101. And Lyon tells us that the quartering of the Fraser and Falconer Arms with these of Mackenzie as shown on Plate VII was, in accordance with practice, sufficient to difference the coat there shown from the arms of the Chief of the Mackenzie Clan. In my judgment, therefore, the petitioner's objection that the respondents are bearing the undifferenced arms of Mackenzie must fail.

As regards supporters, I agree with your Lordships in holding that the savages shown on Plate VII do not "belong to" the peti-

tioner, and that he has no right to object to the respondents including them in their armorial achievement. It is unnecessary to consider the extent and limits of the powers, or the "discretion," competent to Lyon in the matter of granting supporters; these do not appear to be clearly defined by the writers we were referred to, and the practice of the Lyon Office seems to have been at certain periods loose and inconsistent (*e.g.*, Seton, pp. 283 and 285).

The appeal must therefore be refused.

LORD SANDS—This is an appeal from a judgment in the Lyon Court in a petition by Colonel Stewart-Mackenzie of Seaforth craving that a grant of arms made in 1908 by Lyon in favour of the respondents Mrs Fraser-Mackenzie of Allangrange and her husband Captain Fraser-Mackenzie of Bunchrew should be recalled and the said arms deleted from the Lyon Register. Lyon has refused the prayer and dismissed the application, and this appeal is brought against that judgment. Appeals from the Lyon Court to the Court of Session are rare; but there are precedents, and the jurisdiction of the Court to entertain such appeals is not in dispute. It would be affectation, however, to suggest that this Court is versed in the practice of the science or art (for I shall not assign it either character) of heraldry. In this respect, however, the Court is not in a more unfavourable position than down to very recent times was the tribunal of last resort in dealing with cases of Scottish conveyancing. I think this Court should approach questions of heraldry upon similar lines. The Court must examine precedents, weigh authority, and apply the principles which seem to be derived therefrom. But on matters of doubt, particularly where questions of technical detail are involved, the Court should attach great weight to the judgment of the tribunal below, which is versed in the practical administration of this branch of the law.

(*Plate I*) Within or about the years 1672-1677 the armorial bearings of the Earl of Seaforth were recorded in the public register of all arms and bearings in Scotland kept in the office of Lyon, as follows—[*vide supra*, p. 9]. The Earl of Seaforth at this time was Kenneth third Earl, who died in 1678.

There is no earlier record of this complete achievement, but certain of its details and, in particular, the shield with the deer's head cabossed, were undoubtedly much older as arms of the family of Mackenzie of Kintail, chiefs of the Mackenzie clan, the head of which obtained the Earldom of Seaforth. According, however, to a statement of the Earl of Cromartie, himself a Mackenzie, writing in the middle of the seventeenth century, the supporters of the arms of the Mackenzies of Kintail were two deerhounds. The Earl of Cromartie is said not to be a reliable authority upon questions of genealogy. It seems unlikely, however, that he could have been mistaken as to the contemporary arms of the chief of his clan, whose lands were interlaced with his own earldom of Cromartie. The tradition of the canine supporters seems still to have survived when the arms of the ancestors of the present petitioner were recorded in the Lyon Register in 1815, for the dexter supporter is a hound.

In 1716, William fifth Earl of Seaforth was attainted for treason and his arms were forfeited. Since that date the arms recorded *circa* 1672 appear never to have been borne by any family or individual without a mark of difference. According to Lyon the forfeiture of his arms by the attainted Earl did not prevent members of the family not descended from him being authorised to use the arms with a mark of cadency. In this view, at any time down to 1781, when the male issue of the attainted Earl failed, the ancestors of the present petitioner, as descendants of Kenneth third Earl, might have matriculated the arms of their ancestor recorded *circa* 1672 with a proper mark of cadency. The question, however, arises as to what was the effect, if any, of the failure of the male line of the forfeited family. The petitioner maintains that the cadency then flew off, and that Thomas Frederick Mackenzie, then heir-male of the family, and on his death in 1783 his brother Francis, petitioner's ancestor, were entitled to use the arms of their ancestor Kenneth third Earl without any mark of cadency. The respondents on the other hand maintain that the arms recorded *circa* 1672 were forfeited as arms of the head of the family, and could not be used by any descendant of Kenneth third Earl without a mark of cadency.

According to Sir George Mackenzie, forfeiture of arms by attainder did not affect the posterity of the forfeited person. His heir-male could use the family arms forfeited in his person. If this were so, it would seem to follow *a fortiori* that the armorial rights of collaterals were not affected by the forfeiture. As regards descendants, the rule (if as such on the authority of Sir George Mackenzie it is to be regarded) was impliedly abrogated by the Act 7 Anne, cap. 21, section 5, whereby the English rule of corruption of blood was made operative in Scotland. Under this rule forfeiture for treason operated against all descendants of the forfeited person. This Act, however, had no effect as regards collaterals. If prior to the Act of Queen Anne the forfeiture did not prevent the heir-male of the head of the family bearing the family arms without any mark of difference, presumably it did not prevent the collateral heir-male so bearing them on failure of the direct descendants of the forfeited person, such heir-male being a descendant of a common ancestor with the forfeited person entitled to the arms. This right does not appear to be affected by the Act of Queen Anne. It is objected as a difficulty to this view that one of the penalties of treason is that the arms of the traitor are to be torn up at the Market Cross and excised from the books of Lyon. But probably the answer to this is that it is *his, i.e.*, the traitor's arms, not the arms of a family, which are to be torn up, and that the excision from the books of Lyon applies only to arms which the traitor has himself

matriculated therein as his own arms. I can hardly think that the old record in the register of the arms of an ancestor who was a loyal subject, which arms are being borne with the proper marks of cadency by many of his descendants, themselves loyal subjects, is to be excised.

Upon the death in 1781 of Kenneth Mackenzie, but for the attainder seventh Earl of Seaforth, his kinsman Thomas Frederick Mackenzie was heir-male of Kenneth third Earl of Seaforth, their common ancestor. But for the attainder he would have been eighth Earl of Seaforth, and he had already acquired by purchase from his deceased kinsman Kenneth the family estates. What were then his armorial rights? For reasons already stated his right in the family arms seems not to be affected by the attainder. He was heir-male of the last unattainted Earl, and he was chief of the clan. In these circumstances he appears to have had right to the family arms without any mark of cadency. It is true that he was not the heir of line of Kenneth third Earl of Seaforth, or of Kenneth—but for the attainder—seventh Earl. I do not at present inquire what may be the rights in the family arms of an heir of line. But it appears difficult to hold that the heir-male and head of a family is not entitled to the family arms without some mark of cadency if he be not the heir of line. Every time a person in right of bearing arms dies leaving daughters and no sons an heir of line of a certain ancestor hives off in the family tree, and this happens also whenever male descendants more remote than sons fail in any stirps. Accordingly if the heir-male were not entitled to the family arms without marks of cadency there would be very few families in Scotland of more than one or two generations of standing where the heir-male and head of the family was entitled to the family arms undifferenced by marks of cadency, and the right to family arms would in the general case be vested in somebody who did not bear the family name. The theory therefore that the heir of line takes the arms to the exclusion of the heir-male except as a cadet appears to be untenable. I am considering only the general case. There may perhaps be a specialty where the family arms go to the heir of line, as where there is a peerage in the family which the heir of line takes; but I shall refer to this later.

I am accordingly of opinion that upon the death of Kenneth Mackenzie, but for the attainder seventh Earl, a right to the family arms without any difference marking cadency emerged in Thomas Frederick Mackenzie but for the attainder eighth Earl. Upon his death this right passed to his brother Francis but for the attainder ninth Earl. Francis left no sons, but on his death his eldest daughter and heiress was Mary, widow of Sir Samuel Hood, grandmother of the petitioner. As an heiress she was entitled to bear her father's arms undifferenced, and on marriage to impale them with those of her husband. But, according to Lyon's opinion, she could not transmit them to her issue otherwise than as quartered with those of her husband. If the husband had no arms she could not transmit them at all. I see no reason to refuse to accept this opinion, which commends itself to me as in accordance with heraldic principles so far as I understand them. Arms are the distinctive marks of a family. The wife's descendants are members, not of her family but of her husband's. If a Macdonald marries a lady who is a Gordon and their son assumes the Gordon Arms of his mother's family without Macdonald quarterings, that is tantamount to the erroneous assertion that he is a Gordon. Were this permissible undifferenced arms would be constantly jumping across from one family to another, and arms would altogether lose their distinctive character as family marks. The quartering gives arms distinctive of the particular family which is the issue of the marriage, subject, however, to the right of a descendant of the head of his father's family at any time to abandon the maternal quarterings and to revert to the original arms of his paternal ancestor. If a Campbell having right to certain Campbell arms undifferenced marries Miss Bruce, an heiress having right to Bruce arms, the son may quarter the arms of his parents, and these may be transmitted as the arms of the Bruce-Campbell family. But the grandson may say—I am a Campbell. I shall drop the Bruce quarterings and bear the undifferenced arms of my grandfather. He cannot, however, say—I am a Bruce, and I shall drop the Campbell quarterings and bear the undifferenced arms of my grandmother. He is a Campbell; he is not a Bruce. The only argument directed against the Lyon's opinion was to cite one or two alleged cases where an heir of line adopted or resumed his maternal arms without the paternal quarterings. But isolated irregularities do not invalidate a general rule. There is meagre institutional authority and less case law in heraldry. A great deal depends upon tradition, practice, and understanding, of which the Lyon office is the repository, and in a question of this kind, particularly where the matter is one that must have been frequently handled, I think that the Court should be slow to overrule the opinion of Lyon judicially expressed.

Lady Hood resorted to the Lyon office on the death of her father in 1815, and with this a new chapter in the matter begins. But before considering what was then done and what followed thereafter it may be well to summarise the position of Lady Hood as regards armorial rights when she resorted to Lyon in that year. Her rights, present and prospective, appear then to have been fourfold—(1) To bear as heiress of her father the undifferenced arms of Seaforth as recorded *circa* 1672; (2) To bear these arms along with those of her deceased husband Sir Samuel Hood; (3) On a second marriage to bear these arms along with those of her second husband; (4) In case she had issue and her husband was armigerous to transmit the right to these arms, quartered with those of her husband, to the heirs of her body.

The appellant contends that Lady Hood

had a fifth armorial privilege, viz., to transmit the right to the undifferenced arms of Mackenzie of Seaforth to the heir of her body. In the view I take it is not necessary for the purpose of this case to determine that question, but in justice to the argument addressed to the Court it may be proper briefly to examine it. Such a claim is obviously inconsistent with the opinion of Lyon, to which I have already given my assent, that a woman having right to arms of her own family cannot transmit the right to these arms to her issue otherwise than as quartered with those of her husband. Nor do I think that, apart from the actual possession of family estates and other cognate considerations, such a claim can be derived from any legal position of the lady as heiress of her father in respect that he left no male issue. One has only to examine the family tree in the present case to see to what anomalous results such a claim would lead, and that it would not support the contention of the appellant that he is the person entitled to the undifferenced arms of the Seaforth family. There may perhaps, however, be an exceptional case where the real heirship of a family for special reasons may be taken as passing down through a female. There may, for example, be a case where a peerage and old family estates so pass down, and though I think it involves heraldic difficulties, I am not prepared to affirm that it is beyond the competency of Lyon in such circumstances to recognise the right of a person taking through a female to bear the undifferenced family arms as being the real head of the family. As to whether, if this be so, cognate exceptional circumstances are present in the present case I express no opinion. Nor do I need to consider whether, if the attainder of the peerage were removed and the chief to whom it would then belong were found, that would alter the situation as to the right of anybody else to bear the undifferenced arms of Mackenzie of Seaforth.

In 1815 Lady Hood applied to the Lyon Office and obtained what purported to be a grant of arms. These arms are thus described—[*vide supra*, p. 9.]

The explanation of these arms appears to be that as an heiress and a widow Lady Hood was entitled to bear the arms of her husband along with those of her own family, and this is done by an arrangement of two shields instead of a combination on one shield. As her husband was entitled to bear her arms along with his own, her coat appears also on a scutcheon of pretence in front of his shield. The husband had no right to supporters, and accordingly the supporters are derived from the lady's arms. The sinister supporter, the savage, is at once identified with the supporters of Mackenzie of Seaforth recorded *circa* 1672. The dexter supporter, the hound, is suggestive of the older traditionary Mackenzie supporter. The achievement, so far as Mackenzie arms are concerned, differs in two particulars from the achievement as recorded *circa* 1672, viz., the hound supporter, and the absence of the Mackenzie motto. This latter cannot be accounted for by the fact that the grantee was a lady, for the Mackenzie crest is given.

It has not been ascertained whether these arms, minus the Hood adjuncts, were borne by Lady Hood's father, but it is clear that the supporting arrangement did not originate in the Lyon Office in 1815. In an edition of Collins' Peerage, published in 1812, there is an account of Lord Seaforth, Lady Hood's father. The arms are there shown with the greyhound with the collar and badge as the dexter supporter, and the savage as the sinister supporter. Curiously enough, however, in the letterpress description of the arms the supporters are said to be two savages. In Wood's edition of the Douglas Peerage, published in the following year, the arms of Lord Seaforth are stated to be the Mackenzie arms quartered with those of Humberstone, his mother's family. In view of the pains which have been taken with this case it seems strange that neither party has ascertained from the records of Heralds' College whether Lord Seaforth obtained a grant of arms there, an inquiry which the Lyon Clerk tells me could have been made without difficulty, and at less cost than the printing of the letters in the process suggestive of such a grant.

The most remarkable feature of this record of arms in the Books of Lyon is, in my view, the destination whereby the arms, crests, and supporters, other than the Hood shield, are assigned to Lady Hood and the heirs-male of her body. If this record shows, as I am disposed to think it does, a grant and not a mere matriculation (I say mere matriculation, for, as I understand it, every new grant involves a matriculation, though every matriculation does not infer a new grant), the question seems to arise whether the arms so granted to Lady Hood were in a different position from those of a lady who transmits arms as an heiress. In such a case, as I have already explained, if the father is non-armigerous the right of the son to the mother's arms is in abeyance until he obtains a grant of arms of his own family to quarter with them. It would seem odd if a son because his father was non-armigerous could not bear arms expressly granted to his mother's heir-male of the body. It may be, however, that even in this case heraldic rule would require him to acquire arms of his own to quarter with them. I make no attempt to solve this difficulty. But, on the other hand, if so far as Mackenzie arms are concerned the proceedings in 1815 were, as I understand is the contention of the appellant, a matriculation of arms to which Lady Hood had right, the terms of the assignation would appear to import a limitation which did not before exist. Lady Hood could not take and transmit these arms as arms limited in destination to heirs-male. Her own title to take and transmit them depended upon a destination wider than heirs-male. It is obvious, I think, that if the arms of 1672 had been expressly destined in similar terms, *i.e.*, to heirs-male of the body of Kenneth third Earl of Seaforth, Lady Hood could not have transmitted these undifferenced arms, as

Allangrange, not Lady Hood's son, would have been heir-male of Kenneth's body.

Lady Hood married as her second husband a Stewart of Galloway. In 1890 the appellant, on the narrative in the petition that his mother had a grant of arms, crest, and supporters in 1815, and that he desired to quarter them with his paternal arms of Stewart of Galloway, matriculated in the Lyon Register armorial bearings which may be summarised thus:—(*Plate VI*) From the 1815 arms the Hood shield is discarded. On the shield the Mackenzie arms are quartered with those of Stewart of Galloway. The supporters are as in the 1815 arms, but the savage and the hound change places and the hound has no collar. The crests and mottoes are duplicated—Mackenzie and Stewart.

These are the present arms and supporters of the appellant. They are obviously different from the arms and supporters in the grant of which he complains. I understand, however, that he bases his present complaint not upon his right to these arms and supporters so matriculated in 1890, or to the arms and supporters of any 1815 grant, but upon his right to discard these arms and supporters and to adopt as of right the arms and supporters of Kenneth Earl of Seaforth, registered *circa* 1673, undifferenced by quartering or otherwise. He cannot claim these arms and supporters as heir-male or as heir of line of Kenneth, for he is neither the one nor the other. He must rest his claim to these undifferenced arms upon his being the heir of line of Francis Lord Seaforth, who so far as can be shown never bore these arms and supporters, but who was probably entitled to do so. That claim appears to me to involve certain heraldic difficulties for reasons which I have indicated. I do not think it necessary, however, for the disposal of this case to adjudicate upon it. I should not be prepared to do so without the assistance of the considered judgment of the Lyon Court. In my view the matriculation of 1890 imported no recognition by Lyon of the right of the appellant to the undifferenced Seaforth coat. Quartering is a recognised mode of differencing arms. A and B are brothers, A being the elder, with right to the undifferenced family arms. B marries C and has a son D. D may quarter the arms of his uncle A with those of his mother C, and these arms are then differenced arms, the recognition of which implies no recognition of any claim of D to the undifferenced family arms. In the present case I rather think that heraldically the Stewart quarterings should have been in the first and fourth quarters, but this does not affect the character of the Mackenzie arms as differenced by quartering. If the Stewart arms were in the first and fourth quarters that would not imply that the bearer had right to the undifferenced Stewart arms. These arms, though they had the *positio dignior*, would still be differenced by the Mackenzie quarterings.

I turn now to consider the armorial claims of the respondents. In 1812 John Mackenzie of Allangrange executed a deed of entail of the estates of Allangrange by which he directed that the heirs of entail should "retain, use, and bear the surname, arms, and designation of Mackenzie of Allangrange as their own proper surname, arms, and designation in all time coming." Upon the death in 1815 of Francis Lord Seaforth, the appellant's great-grandfather, George Falconer Mackenzie, who had meantime succeeded to Allangrange under the entail, became heir-male of the family of Mackenzie of Seaforth and chief of the clan. There is no record in the Lyon Register or other evidence of the existence of arms of Mackenzie of Allangrange prior to this date. The family did not come into existence as Mackenzie of Allangrange until about the time when the Lyon Register was established by statute, and during the whole of the intervening period down to 1815 any person bearing arms without having recorded them in the books of Lyon was subject to a penalty. It appears to me that in these circumstances the presumption is that no such arms were borne. The direction in the deed of entail does not affect this view. It follows an ordinary style. It may be that whilst the entailer contemplated applying for a grant of arms of Mackenzie of Allangrange he put it off owing to the expense, but in any case his son promptly applied for a grant of arms of Mackenzie of Allangrange upon succeeding under an entail which required him to bear such arms. This application was made in 1817. I concur in the view of Lyon for the reasons he gives that what was then obtained was a grant and not a mere matriculation. I have little doubt, however, that Allangrange then conceived that as chief of the clan and heir-male of Kenneth third Earl of Seaforth he was entitled to the undifferenced arms of Seaforth. But under the deed of entail he was obliged to bear the arms of Mackenzie of Allangrange. In these circumstances had he simply matriculated the arms of Mackenzie of Seaforth a question might quite conceivably have been raised under the entail. (*Plate V*) Accordingly he differenced the arms by introducing Falconer quarterings to which he had no right except by grant, and obtained a grant of the quartered arms as the arms of Mackenzie of Allangrange. As chief of the clan there could be no question about his right to supporters.

The last heir-male of Allangrange, James Fowler Mackenzie, died in 1907. During the intervening period of ninety years the arms in question were borne by the Allangrange family as the arms of Mackenzie of Allangrange under a deed of entail which required them to bear these arms. It may be that at any time during this period Mackenzie of Allangrange might apart from the entail have discarded the Falconer quarterings and borne the undifferenced Mackenzie arms, not as Mackenzie of Allangrange, but as chief of the clan and head of the house of Mackenzie of Seaforth. But he did not do so. In these circumstances I am of opinion that the arms of 1817, with the Falconer quarterings, were upon the death of James Fowler Mackenzie in 1907 the arms of Mackenzie of Allangrange, not the arms of

Mackenzie of Seaforth. The Falconer quarterings on the coat marked no armorial right vested by descent in the representative of the family of Seaforth, but were a grant to Mackenzie of Allangrange as part of the arms of that family.

On the death of James Falconer Mackenzie the estate of Allangrange stood destined to the respondent Mrs Fraser Mackenzie under a new entail requiring the heir to bear the arms of Mackenzie of Allangrange. I shall advert later to the question whether she was a stranger in blood to Allangrange. I confess, however, that in my view one of kin who is not the heir has no better right to the undifferenced arms of the head of a family than has a stranger. The respondent does not claim the Allangrange arms as the heir-male, or the heir of line, of Mackenzie of Allangrange. I shall accordingly consider the question of the right to the undifferenced arms on the footing that the respondent, whether of kin or not, was not the heir. Opinion may have fluctuated or hesitated, but in my view, both upon principle and upon authority, an entailer cannot directly or indirectly assign his family arms to a person who is not entitled to these arms as his heir. Accordingly James Fowler Mackenzie was not in a position to assign the arms of Mackenzie of Allangrange to the respondent. The Lyon Office, however, has always been very benevolent to entails, and the difficulty is usually got over by a new grant of the entailer's arms. It appears to me to be more than doubtful whether the undifferenced arms of a family can be granted to a stranger or a person other than the heir, if there be an heir, who though not favoured by the entail is entitled to these arms. Lyon, however, may give a grant to the institute under the entail of the arms of the entailer differenced in order that these may be borne as the arms of himself and his successors as proprietors of the entailed estate. Differenced arms are different arms. They are not the arms of the person having right to the arms without the differences. Any other view would lead to certain persons who had obtained grants of arms having a monopoly in certain charges, such as a stag's head or a leopard. The trade-mark rule of being so like as possible to deceive the man in the street does not apply in modern heraldry, which discriminates minutely. Accordingly if Lyon chose to give a stranger arms closely resembling existing arms but differing heraldically therefrom, I do not think that the person having right to the undifferenced arms would have a title to object. I quite recognise that Lyon has a discretion, and that he might very properly, particularly if there were no compelling reason such as an entail, refuse to grant arms only slightly differenced from those of another family. I conceive that it is for this reason that the position of a cadet is more favourable than that of a stranger. In the case of a stranger Lyon has a discretion to refuse to grant arms closely resembling existing arms though differenced therefrom. In the case of a cadet he has no such discretion.

If upon the death of James Fowler Mackenzie there was no person who had right to the arms of Mackenzie of Allangrange granted in 1817, I am of opinion that Lyon might have granted these arms to the respondent undifferenced. In any case I am of opinion that if he differenced them no person had any title to challenge the grant.

What happened was this—Upon succeeding as heiress of entail the respondent Mrs Fraser Mackenzie, who had married Captain Fraser of Bunchrew, obtained the grant of arms complained of. The arms are differenced from the Allangrange arms of 1815 by the introduction of the Fraser coat instead of the Falconer coat in the second quarter (*Plate VII*).

According, as I understand, to long-standing practice of the Lyon Office, coats of arms of persons bearing armigerous names, if I may use such an expression, are almost invariably made by a process of differencing. It may occasionally happen that some person has some peculiar fancy as to charges, or that some person who bears a rare and non-armigerous name applies for arms, but in general the basis is a coat traditionally associated with the name. This is confirmed by an examination of any work which contains a number of plates of arms of persons bearing the same name though of different family or descent. There are a large number of coats of arms of distinguished lawyers upon the windows of the Parliament Hall. If any person familiar with heraldic charges were given simply the surnames of these lawyers he would not be able to describe the coats, some of which are very complicated, but he would be able as to each name to mention certain charges which would be found upon the arms of the bearer of that name. One mode of differencing is by quartering, and, as I have already indicated, I accept the view of Lyon that this is a legitimate and sufficient mode of differencing as marking cadency. This might appear to be inconsistent with the view that in certain cases where arms are differenced by quartering the person in right of these arms has right to discard certain quarterings and revert to the undifferenced arms of an ancestor. But I understand it to be conceded that the character of the quartering as marking cadency cannot be determined by a mere examination of the shield. The historical origin of the quartering must be taken into account. Applying this test to the respondent's arms, there can, I think, be no suggestion that they import a right to the undifferenced arms of Mackenzie of Seaforth, and a right to drop the non-Mackenzie quarterings and to revert to undifferenced Mackenzie of Seaforth arms. They are either a grant of arms to a cadet differenced by quarterings, or they are a new grant of the whole arms as a *unum quid* to a stranger with no right to alter them in any particular.

In my view, for the reasons stated, the arms of the respondent, granted in 1908, are differenced both from the Seaforth arms, recorded *circa* 1672, from the arms of Mackenzie of Allangrange, recorded in 1817,

and from the arms borne by the appellant; and it was within the competency of Lyon to grant these arms to the respondents.

There remains to be considered the question of supporters, which, I understand, the appellant challenges upon three grounds—(1) That the respondent has no right to supporters; (2) that the supporters in question are appellant's supporters; (3) that in any event, the giving of these supporters to a shield upon which there are Mackenzie quarterings is an infringement of appellant's rights.

(1) The extent to which the right of supporters extends seems to be somewhat ambulatory, and practice seems to have varied. I am not prepared to endorse without qualification the statement of Lyon, that the matter is one within his discretion. There are certain classes of persons whose right to supporters is supported by constant and uniform usage. I am not prepared to affirm that if Lyon were to refuse supporters to such a person, *e.g.*, a Peer, the person aggrieved would not have a right of redress by way of appeal. Logically, I think this must be extended to every case where supporters are claimed as of right. I am not prepared, however, to affirm that the power of Lyon to grant supporters is limited to cases of absolute right, and that there may not be cases where for special personal or family or traditionary reasons he may exercise a discretion. The exercise of this discretion, if it exists, is not in my opinion subject to review. But however this may be, a third party has no right to challenge a grant of supporters unless these supporters are claimed and given upon grounds which import a recognition of a right or rank which is claimed by the challenger, such, *e.g.*, as the chieftainship of a clan.

(2) I accept the opinion of Lyon, which can readily be confirmed by turning over the pages of the Lyon Register, that there is no more a monopoly in supporters than there is in charges on a shield.

(3) The third objection stated above appears to me to raise, if not the most difficult question, at all events the question upon which the appellant has the most plausible grounds of complaint. In considering it I shall assume what, as I have indicated, is not determined, that the appellant has right to the undifferenced arms of Seaforth as recorded *circa* 1672. In my view when a person has on his own shield the arms of a family differenced only by other quarterings on the second and third quarters, Lyon should be slow to grant that person the same supporters as those of the shield of the head of the family having right to these arms undifferenced. We are not here, however, concerned with any questions of discretion, but with one of right. For the reasons I have stated the coat on the shield granted by Lyon to the respondent bears different arms from those of the appellant, and as in a question with the appellant Lyon was entitled to grant these arms. No adjuncts can, I think, make them the arms of the appellant, which Lyon is not entitled to grant to another person. As I have already indicated, in my view if arms are different they cannot be challenged because they resemble the arms of the challenger. If the arms are heraldically different the challenger cannot say "You have not differenced them enough." I think Lyon might very properly refuse in his discretion to grant arms only slightly different from those on an existing coat. But I do not think that if in his discretion he thought fit to grant them the person having right to the latter coat could come forward and maintain "You must difference them more."

The only other question which I think it proper to notice, though it does not enter into the grounds of my opinion, is the question whether the respondent is of the family of Mackenzie of Seaforth or Kintail, and as such entitled to their arms differenced. It is common ground that respondent's ancestors were descended from a Mackenzie of Kintail. As such, even though of illegitimate descent, they were entitled according to practice, which Seton traces back to the fifteenth century, to bear the family arms with the proper marks of illegitimate descent. The only question, therefore, which could here arise would be whether there should be incorporated in these arms a "bordure compony" (which, according to Scottish practice, is the equivalent of the bend sinister) or some other mark of illegitimacy. In my view the appellants have failed to prove facts which would have warranted Lyon in attaching any such mark of derogation if the respondent had applied for the recognition of a right to bear as a cadet the arms of Mackenzie of Kintail with the proper marks of cadency.

In my opinion the appeal fails.

LORD SALVESEN and LORD ORMIDALE were absent.

The Court pronounced this interlocutor—

"Dismiss the appeal: Restore the interlocutor of the Lord Lyon dated 21st October 1918: Find in fact (1) that the petitioner is the grandson of Mary Frederica Elizabeth Mackenzie or Stewart, who married (first) Admiral Sir Samuel Hood and (second) James Alexander Stewart, nephew of the seventh Earl of Galloway; (2) that the said Mary Frederica Elizabeth Mackenzie was the senior heiress of line of Francis Lord Seaforth, who died in 1815; (3) that the said Francis Lord Seaforth was the grandson by male descent of Colonel Alexander Mackenzie of Conansbay, the third son of Kenneth third Earl of Seaforth, who died in 1678; (4) that between the years 1672 and 1677 the said third earl matriculated the achievement of arms shown on Plate I; (5) that the said Francis Lord Seaforth in 1783, when he succeeded to his elder brother Thomas Frederick Mackenzie Humberston, was heir-male of the said third earl and became proprietor of the family estates which his brother had purchased in 1781; (6) that the said Francis Lord Seaforth entailed the

family estates on the heirs-male of his body (who failed), whom failing the heirs-female of his body and other heirs of entail, all such heirs being bound to bear the surname, arms, and designation of Mackenzie of Seaforth, conform to the clause quoted in the petition; (7) that the said Mary Frederica Elizabeth Mackenzie or Stewart succeeded to the family estates in virtue of the said entail, and that the petitioner succeeded to and still holds a small part of the same but not either the estates of Seaforth or Kintail; (8) that the said Mary Frederica Elizabeth Mackenzie in 1815, when the widow of Admiral Hood, matriculated the coat of arms shown on Plate IV, and that the petitioner in 1890 matriculated the coat of arms shown on Plate VI; (9) that in 1817 George Falconer Mackenzie of Allangrange, being then the apparent heir-male of Kenneth third Earl of Seaforth, matriculated the coat of arms shown on Plate V; (10) that in 1877 James Fowler Mackenzie, who died in 1907, second and eldest surviving son of the said George Falconer Mackenzie, executed a deed of entail under which the respondent Mrs Fraser-Mackenzie was the institute and is now in possession of the estate of Allangrange; (11) that by said deed of entail it was provided that the respondent, therein designed Beatrice Anna Mackenzie, and each of the heirs of entail, 'shall be obliged in all time coming after succeeding to the said lands to use and retain the surname of Mackenzie and the arms and designation of Mackenzie of Allangrange, without prejudice to his or to her using and retaining therewith any other surname, arms, or designation'; (12) that in 1908 the respondents matriculated by interlocutor of the Lyon King a coat of arms shown on Plate VII; (13) that the arms granted to the respondents in 1908 quartered with the Mackenzie arms those of Fraser of Bunchrew and those of the Falconers; (14) that it has not been proved that the respondent Mrs Fraser-Mackenzie is a stranger in blood to the family of Mackenzie of Kintail: Find in law (1) that the said arms of 1908 are sufficiently differenced to any arms to which the petitioner has right, and that the petitioner is not entitled to challenge the respondents' right to the said arms; (2) that the respondents have right to use the said arms shown on Plate VII; (3) that the petitioner has no title to challenge the respondents' right to use the supporters shown on Plate VII; and (4) that the respondents have right to use the said supporters: Affirm the dismissal of the petition, and decern: Recal the finding for expenses in the interlocutor of the Lord Lyon dated 21st November 1919: Find the petitioner and appellant liable to the respondents in the expenses incurred both in this Court and in the Lyon Court," &c

Counsel for the Petitioner — Macphail, K.C. — Mackay, K.C. — W. H. Stevenson. Agent—John C. Brodie & Sons, W.S.

Counsel for the Respondents—Stevenson, K.C.—Leadbetter. Agents—Mackenzie & Black, W.S.

Tuesday, October 26.

SECOND DIVISION.

[Bill Chamber.

ELLERMAN'S WILSON LINE, LIMITED *v.* COMMISSIONERS OF NORTHERN LIGHTHOUSES.

Expenses — Ship — Action in rem — Arrestment — Expenses of Bail Bond.

The expense of procuring a bail bond incurred by an arrestee in order to liberate his ship, which had been arrested as a preliminary to an unsuccessful action *in rem*, cannot be charged against the opposite party, such expense not being part of the expenses of process.

The Ellerman's Wilson Line, Limited, owners of the s.s. "Finland," *petitioners*, presented a petition for warrant to arrest the s.s. "Pole Star," belonging to the Commissioners of Northern Lighthouses, incorporated under the Merchant Shipping Act 1894, *respondents*. An action had originally been brought by the petitioners against the respondents for damages due to a collision between the two vessels in which the respondents pleaded the Public Authorities Protection Act as excluding the action. That action was then withdrawn, and in order to enforce their maritime lien, the petitioners brought an action *in rem* against the "Pole Star," which required as a preliminary the arrest of that vessel. Warrant to arrest *ad interim* was granted in the Bill Chamber on 3rd April 1919. In the subsequent action *in rem* the Lord Ordinary (BLACKBURN) held that the accident was not due to the fault of either ship, and found the defenders, the owners of the "Pole Star," entitled to their expenses. Thereafter in the Bill Chamber the arrestments were recalled, the petition dismissed, and the respondents found entitled to expenses. The Auditor having allowed, as part of the expenses, the expense incurred by the respondents in replacing the ship with a bail bond for £25,000, objections to his report were lodged. On 3rd August 1920 the Lord Ordinary reported the cause to the Second Division.

Note. — [*After narrating the facts*] — "Objections are now taken to the Auditor's report in respect that he has allowed against the petitioners a sum of £125 as the expense incurred by the respondents in replacing the ship with a bail bond for £25,000. It was stated at the bar that whereas at one time such expenses were not allowed where arrestments had been used *ad fundandam jurisdictionem*, there had latterly been a change of practice, and on inquiry from the Auditor I have ascertained that this is the case. The change seems to have followed